11-1800-13206-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Amendments to Rules Governing Family Community Support Services under Medical Assistance; Minnesota Rules, parts 9505.0323, 9505.0324, 9505.0326, and 9505.0327.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

A hearing concerning the above rules was held by Administrative Law Judge Barbara L. Neilson at 9:00 a.m. on January 5, 2001, in Room 5F, Department of Human Services, 444 Lafayette Road North, St. Paul, Minnesota.

That hearing and this Report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act[1] before an agency can adopt rules. The legislature has designed the rulemaking process to ensure that state agencies—here, the Department of Human Services—have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the Agency may have made after the proposed rules were initially published do not result in them being substantially different from what the Agency originally proposed. The rulemaking process also includes a hearing to allow the Agency and the Administrative Law Judge reviewing the proposed rules to hear public comment about them.

Robert Sauer, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared at the rule hearing on behalf of the Department of Human Services. The members of the Department's hearing panel were: Glenace Edwall, Ph.D., Director of the Department's Children's Mental Health Division; Don Allen and Karry Udvig, employees of the Department's Children's Mental Health Division; and Caryn Ye, DHS Legal Analyst.

Approximately thirty persons attended the hearing. Twenty-six persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

After the hearing ended, the Administrative Law Judge kept the administrative record open for another twenty calendar --that is, until January 25, 2001--to allow interested persons and the Department to submit written comments. During this initial comment period the Administrative Law Judge received written comments from interested persons and the Department of Human Services. Following the initial comment period, Minnesota law[2] requires that the hearing record remain open for another five business days to allow interested parties and the Agency to respond to any

written comments. The Department of Human Services and other interested persons filed written comments by the close of business on February 1, 2001. The Department of Human Services proposed additional changes to the rules in its reply comments. The hearing record closed for all purposes on February 1, 2001. The Chief Administrative Law Judge approved an extension to March 13, 2001, to complete this rule report.

NOTICE

The Department of Human Services must make this Report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. During that time, this Report must be made available to interested persons upon request.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for his approval.[3] If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he will advise the Department of Human Services of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department of Human Services may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Department of Human Services may not adopt the rules until it has received and considered the advice of the Commission. However, the Department of Human Services is not required to wait for the Commission's advice for more than 60 days after the Commission has received the submission of the Department of Human Services.

If the Department of Human Services elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changesand the Chief Administrative Law Judge determines that the defects have been corrected, then the Department of Human Services may proceed to adopt the rules. If the Department of Human Services makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the Secretary's proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.[4]

After adopting the final version of the rules, the Department of Human Services must then submit the rules to the Revisor of Statutes for a review of their form. After the Revisor of Statutes approves the form of the rules, the rules must be filed with the Department. On the day that the Department makes that filing, it must give notice to everyone who requested to be informed of that filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Compliance with Procedural Rulemaking Requirements

1. On August 23, 1999, the Department of Human Services published a Request for Comments on planned rule amendments to rules governing family community support services. (Exhibit A.) The Request for Comments was published at 24 State Register 259.

2. The Department of Human Services distributed the Request for Comments at the September 1999 human services conference sponsored by the Minnesota Association of Community Mental Health Programs, a provider advocacy organization. The conference audience included health plan representatives, mental health providers, and county social service staff. The Department also sent the Request for Comments via electronic mail to children's mental health collaboratives; mailed notices to county social services directors; met twice with the rules committee of the Minnesota Association of County Social Service Administrators; met with two of the eight Prepaid Medical Assistance Program contracted health plans; and convened nine rulemaking advisory committee meetings over seven months to solicit input and criticism as the proposed amendments were being developed. The Department also distributed rule drafts to eight contracted PMAP health plan providers, public health committee members, and staff from the Department of Children, Families, and Learning. (SONAR at 7.)

3. On October 12, 2000, the Department of Human Services requested the scheduling of a rules hearing for January 5, 2001, and filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rule amendments;

(b) a copy of the Notice of Hearing proposed to be issued; and

(c) a draft of the Statement of Need and Reasonableness ("SONAR").

4. An additional notice plan was reviewed and approved by the Administrative Law Judge on October 19, 2000. In addition to the groups listed in the SONAR, the Administrative Law Judge suggested that the Department also include in its additional notice plan the Children's Law Center of Minnesota and legal aid or legal service programs that serve low income individuals and families across Minnesota.

5. On November 22, 2000, the Department of Human Services mailed a copy of the SONAR to the Legislative Reference Library as required by law.[5] (Exhibit D.)

6. On November 22, 2000, the Department of Human Services mailed the Notice of Hearing and a copy of the proposed rules to all persons and associations on the Department's current rulemaking mailing list. (Exhibits F and G.)

7. On November 22, 2000, the Department also mailed the Notice of Hearing and a copy of the proposed rules to the following persons and associations: eight health plan providers that provide services relating to the proposed rules; community mental health providers; county social service staff and directors; rulemaking

advisory committee members; the Department of Children, Families and Learning; the Department of Health; the Department of Corrections; Providers of Color Network Development Project; Legal Aid Society of Minneapolis; Children's Law Center; PACER, Inc.; and the Minnesota Association of Community Mental Health Programs. Karry Udvig of the DHS met with public health nurses working with the DHS Community Supports for Minnesotans with Disabilities in November of 2000 and discussed the proposed rules with them. (Exhibits F and H; DHS Letter of Feb. 1, 2001.)

8. The Department did not mail the notice and rules to school districts or Head Start agencies, as it said it would in the original additional notice plan approved by the Administrative Law Judge. After approval of the additional notice plan, the Department determined, in consultation with staff of the Minnesota Department of Children, Families and Learning, that it would be premature to notify schools and Head Start agencies about the proposed amendments because the services are not currently available as MA-reimbursable services. In addition, although the Administrative Law Judge suggested that the Department mail the Notice of Hearing and a copy of the proposed rules to legal aid and legal services organizations throughout the state, the Department merely sent the materials to the Director of the Legal Aid Society of Minneapolis. This was done because the central office of the Legal Aid Society informed the DHS rule writer that it would mail the rule materials to legal aid satellite offices. The Legal Services Advocacy Project in St. Paul was also on the Department's mailing list (Exhibits F and H.)

9. On November 27, 2000, a copy of the proposed rules and the Notice of Hearing were published at 25 State Register 1012. (Exhibit E.)

10. On November 27, 2000, the Department mailed a copy of the Notice of Hearing and the SONAR to the Chair of the Senate Health and Family Security Budget Division, the Senator Majority Whip, the Chair of the House Health and Human Services Finance Committee, and the Chair of the House Health and Human Services Policy Committee. (Exhibit J.)

11. On December 21, 2000, the Department filed a copy of the proposed rule amendments as certified by the Office of the Revisor of Statutes (Exhibit B) and a copy of the updated SONAR (Exhibit C) with the Office of Administrative Hearings.

12. On the day of the hearing, the Department placed the following additional documents into the record:

(a) the Department's Request for Comments as published in the State Register on August 23, 1999 (Exhibit A);

(b) the proposed rule, certified by the Revisor of Statutes (Exhibit B);

(c) the SONAR (Exhibit C);

(d) the Certificate of Mailing the Statement of Need and Reasonableness to the Legislative Reference Library (Exhibit D);

(e) the Notice of Hearing as published in the State Register (Exhibit E);

(f) the Certificate of Mailing the Notice of Hearing, the Certificate of Mailing List, and the Certificate of Additional Notice (Exhibits F, G, and H);

(g) a written comment on the proposed rule received from Mary Jo Verschay of the Ramsey County Children's Mental Health Collaborative on December 18, 2000 (Exhibit I); and

(h) the Certificate of Sending Notice to Legislators (Exhibit J).

13. Families for Effective Autism Treatment ("FEAT") complained at the hearing that, while the Department was aware that members of FEAT were interested in the proposed rule, FEAT was not provided direct notification. In addition, Sonja Kerr, an attorney who represents parents of children with disabilities, alleged that the Department failed to comply with notification requirements set forth in the Individuals with Disabilities Education Act ("the IDEA") by not sending notice of the proposed rule amendments and the public hearing directly to parents of children with disabilities.

14. In response to the notice concerns raised by FEAT, the Department indicated that it did not intentionally omit FEAT from the list of those who were provided notice under the agency's additional discretionary notice plan. The Department pointed out, however, that, even though the hearing notice was not mailed to FEAT or its members, Department staff discussed the proposed rules and details about the hearing location and how to submit comments during meetings that were held with FEAT members and representatives on November 3 and 27, 2000. In response to the notice concerns raised by Ms. Kerr, the Department denied that it violated any notice requirements set forth in the IDEA.

15. The Department's Request for Comments published on August 23, 1999, announced that comments were requested on planned amendments to rules governing family community support services to ensure that the rules were consistent with the statutory changes made by the Legislature in 1999 that added certain family community support services to those currently covered by MA (i.e., services identified in an individual treatment plan provided by a trained mental health behavioral aide under the direction of a mental health practitioner or mental health professional, mental health crisis intervention and crisis stabilization services provided outside of hospital inpatient settings, and the therapeutic components of preschool and therapeutic camp programs).[6] Members of the public thus were placed on notice of the broad scope of the rules, although the Department had not yet prepared a draft of the planned rule amendments. In addition, as noted above, the Department did, in fact, seek and gain approval of an additional notice plan under Minn. Stat. § 14.101. That statute provides that, "[i]f an agency has made a good faith effort to comply with this section, a rule may not be invalidated on the grounds that the contents of this notice are insufficient or inaccurate." While it may have been appropriate for the Department to include FEAT as one of the parties to be notified under its additional notice plan, its inadvertent failure to do so cannot be considered a procedural defect. Moreover, counsel for FEAT, Karen Cole, was included on the Department's list of those to be notified of agency rulemaking.[7] Moreover, FEAT did receive a copy of the rules in time to make an oral presentation during the hearing and file written comments during the post-hearing

comment period. There has been no showing of a defect in the notification process with respect to FEAT.

16. The IDEA specifies that, "[p]rior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities."[8] The regulations issued under the IDEA reiterate this requirement and further provide that "[a] State will be considered to have met [these requirements] with regard to a policy or procedure needed to comply with this part if it can demonstrate that prior to the adoption of that policy or procedure, the policy or procedure was subjected to a public review and comment process that is required by the State for other purposes and is comparable to and consistent with the requirements of Secs. 300.280-300.284."[9] The provisions of the IDEA and the regulations issued thereunder, even if applicable here, thus do not require that individualized direct notice of a proposed rule be given to parents of children with disabilities. Because the proposed rules at issue in this proceeding are not being adopted by a state educational agency and it does not appear that the proposed rules are in way needed to comply with the IDEA, the Administrative Law Judge concludes that the IDEA notice provisions are not applicable in this rulemaking proceeding. Moreover, even if the IDEA notice requirements were applicable, it is evident that the public notice, review, and comment process followed by the Department in this rulemaking proceeding under the Minnesota Administrative Procedure Act would satisfy the notification and participation requirements set forth in the IDEA and the rules promulgated under the IDEA.

17. Under Minn. Stat. § 14.15, subd. 5, the Administrative Law Judge must:

> disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the administrative law judge finds: (1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

The Administrative Law Judge finds that, if any deficiency in the notification process infact occurred with respect to FEAT, parents of children with disabilities, or entities who did not receive notice in accordance with the Department's Additional Notice Plan, it constitutes a harmless error within the meaning of § 14.15, subd. 5. (Additional notice issues raised with respect to the Department's modification of proposed rule part 9505.0326, subpart 7, will be considered separately in connection with the discussion of that rule part.)

Nature of the Proposed Rules

18. The Medical Assistance ("MA") MA program is a joint federal-state program that provides for the medical needs of low income or disabled persons and families with dependent children. The DHS has been designated by the Legislature to

supervise the administration of the MA program by county agencies.[10] Services that are eligible for MA payment in Minnesota include family community support services.[11] Such services are designed to help children under the age of 18 who have severe emotional disturbance or young adults ages 18 to 21 who have serious and persistent mental illness remain with their families in the community.[12] Relevant statutes define what is meant by emotional disturbance, serious and persistent mental illness, and the criteria for severe emotional disturbance.[13]

19. In 1996, the DHS promulgated Minnesota Rules part 9505.0326, which sets forth the conditions under which MA will cover family community support services ("FCSS"). The current rule specifies that FCSS means only those services set forth in clauses (3) to (6) of Minn. Stat. § 245.4871, subd. 17.[14] Thus, under the current rule provision, only the following family community support services are identified as being covered by MA: assistance in developing independent living skills; assistance in developing parenting skills necessary to address the needs of the child with severe emotional disturbance; assistance with leisure and recreational activities; and crisis assistance, including assistance in locating crisis placement and respite care.[15] The rule goes on to state that the services set forth in clauses (1), (2), and (7) of Minn. Stat. § 245.4871, subd. 17 (relating to client outreach to each child with severe emotional disturbance and the child's family, medication monitoring where necessary, and professional home-based family treatment) "are not family community services eligible for medical assistance payment under this part."[16]

20. In 1999, the Minnesota Legislature amended Minn. Stat. § 256B.0625, subd. 35, by adding new family community support services to those that were then covered by MA.[17] As amended, subdivision 35 reads as follows (new language is underlined):

> Subd. 35. **Family Community Support Services.** Medical assistance covers family community support services as defined in section 245.4871, subdivision 17. <u>In addition to the provisions of section 245.4871, and to the extent authorized by rules promulgated by the state agency, medical assistance covers the following services as family community support services:</u>
>
> (1) <u>services identified in an individual treatment plan when provided by a trained mental health behavioral aide under the direction of a mental health practitioner or mental health professional;</u>
>
> (2) <u>mental health crisis intervention and crisis stabilization services provided outside of hospital inpatient settings; and</u>
>
> (3) <u>the therapeutic components of preschool and therapeutic camp programs.</u>[18]

As part of the same enactment, theLegislature directed the Commissioner of DHS to amend Minnesota Rules parts 9505.0323, 9505.0324, 9505.0326, and 9505.0327 "as necessary to implement the changes outlined in Minnesota Statutes, section 256B.0625, subdivision 35."[19] In accordance with the Legislature's directive, this rulemaking proceeding involves a proposal by the Minnesota Department of Human

Services to amend rules governing family community support services to ensure that this specific set of services is added to the family community support services covered by MA.

Statutory Authority

21. As noted above, the Legislature in 1999 directed the Commissioner of DHS to amend Minnesota Rules parts 9505.0323, 9505.0324, 9505.0326, and 9505.0327 as necessary to implement the changes that were made to Minn. Stat. 256B.0625, subd. 35.[20] In addition, the Commissioner has been granted authority to "[m]ake uniform rules, not inconsistent with law, for carrying out and enforcing the provisions hereof in an efficient, economical, and impartial manner, and to the end that the medical assistance system may be administered uniformly throughout the state, having regard for varying costs of medical care in different parts of the state and the conditions in each case, and in all things to carry out the spirit and purpose of this program. . . ."[21] The Administrative Law Judge concludes that these statutes provide the Department of Human Services with ample general authority to adopt rules addressing family community support services under the MA program. Authority to adopt specific rule provisions will be addressed in the rule-by-rule analysis below.

Rulemaking Legal Standards

22. Under Minn. Stat. § 14.14, subd, 2, and Minn. Rule 1400.2100, one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, the Agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or the Agency may simply rely on interpretation of a statute, or stated policy preferences.[22] The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Department's staff primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by the Department's witnesses at the public hearing and in written post-hearing submissions.

23. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[23] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[24] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[25] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[26] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one a rational person could have made.[27]

24. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Department of Human Services complied with the rule adoption procedure, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[28]

Impact on Farming Operations

25. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. In essence, the statute requires that an agency must provide a copy of any such proposed rule change to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register.

26. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations. The Administrative Law Judge finds that the proposed rule change will not affect farming operations in Minnesota, and thus finds that no additional notice is required.

Regulatory Analysis

27. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
>
> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
>
> (5) the probable costs of complying with the proposed rule; and
>
> (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

28. The SONAR includes a discussion of the analysis that was performed by the Department of Human Services to meet the requirements of this statute.[29] With respect to the first requirement, the Department notes that the amendments add four new MA-covered mental health services for children with severe emotional disturbance: (1) mental health behavioral aide services are added to the family community support

service package, thereby giving the child a trained mental health paraprofessional to help the child complete goals and objectives identified in the treatment plan; (2) mental health crisis intervention and crisis stabilization services are added as a new service to provide a less intrusive level of service for a child in crisis as opposed to urgent care or emergency room settings; (3) therapeutic components of a pre-school program are added to provide early intervention services for children with severe emotional disturbance; and therapeutic components of a therapeutic camp program are added to allow children with serious emotional disturbance to learn new skills and apply the skills acquired through meeting the goals and objectives in their treatment plans. Thus, the Department indicated that children who are currently receiving services under the family community support service package will be affected by having access to these new services. In addition, the Department pointed out that children with severe emotional disturbance who are receiving other more intensive service packages will also be able to access some of these new services. For example, a child in foster care receiving therapeutic support of foster care will be able to access mental health behavioral aide and mental health crisis intervention and crisis stabilization services during their transition into or out of therapeutic support of foster care. The Department noted that the proposed rule may also affect families who have children with severe emotional disturbance; children's mental health collaboratives; family services collaboratives; providers, including mental health professionals and practitioners; county human services agencies and staff; advocacy organizations; communities; and persons represented by the organizations participating on the advisory committee.

29. With respect to the second requirement, the Department emphasized that costs would be shared by the state and federal governments because the services are covered by medical assistance. The Department attached a fiscal note to its SONAR projecting the total cost of medical assistance coverage, both state and federal, for the rule amendments for fiscal years 2001, 2002, and 2003. In response to questions from those attending the rule hearing, the Department provided further information about its fiscal note calculations in its January 17, 2001, post-hearing submission.

30. The third requirement imposed by Minn. Stat. § 14.131 asks the Agency to determine whether there are less costly or less intrusive methods to achieve the purposes of the proposed rules. The Department indicated in its SONAR that there are no other less costly or less intrusive methods of providing community-based mental health services to the targeted population. The SONAR indicates that these services are intended to offer more alternatives to the current community-based mental health services which, in turn, are less expensive than institution-based mental health services. The Department stated that "[t]hese services are mostly intended to supplant the use of personal care assistants (PCAs) and the more costly institution-based mental health services such as those offered by inpatient hospitalization and children's residential treatment."[30]

31. The fourth provision of Minn. Stat. § 14.131 requires the Agency to describe any alternative methods that were considered and the reasons they were rejected. In the view of the Department, the addition of these new services to the MA-covered services already in effect is the best alternative not only due to federal and state sharing of costs but also because these services can be easily accommodated by

the present system. Without these services, the Department stated that it would be likely that there would be continued expenditures for personal care assistants who do not have mental health training, increased expenditures for out-of-home placement, and more children receiving a level of care that is not appropriate for their needs. In the Department's opinion, the proposed amendment represents the best alternative for achieving the purpose of increasing flexible treatment options for children with severe emotional disturbance so as to allow them to stay with their families and in the community.

32. The fifth factor required to be considered under Minn. Stat. § 14.131 is the probable cost of complying with the proposed rules. The SONAR indicates that the administrative costs associated with the implementation of the rule may vary from county to county. Counties that have existing programs for implementing and enforcing mental health services may be able to absorb the additional obligations under the proposed rules with minimal costs, while counties with little or no internal implementation and enforcement capabilities may incur some costs to take on the additional responsibilities. The Department also noted that providers of mental health services would likely incur additional costs associated with recruitment, training, clinical supervision and service coordination.

33. The sixth factor set forth in Minn. Stat. § 14.131 requires an assessment of differences between the proposed rule and existing federal regulations. The Department noted in the SONAR that the proposed amendments are not in conflict with existing federal regulations and pointed out that the Department must submit an amendment to the State's MA plan filed with the federal government when it proposes to change state MA coverage.

34. The Administrative Law Judge concludes that the Department has sufficiently complied with the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules.

Performance-Based Rules

35. Minnesota Statutes §§ 14.002 and 14.131 require that the SONAR describe how the agency, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals. The Department maintains in the SONAR that it is not feasible to base standards governing payment for MA services on superior performance, in part due to the statutory requirement in Minn. Stat. § 256B.04, subd. 2, that the department make "uniform rules" for implementing the MA program. The Department does contend, however, that the proposed amendments emphasize flexibility and de-emphasize prescriptiveness by identifying minimum standards regarding provider credentialing, clinical supervision, family involvement, and culturally and linguistically appropriate mental health services for inclusion in the rules.

Additional Notice Plan

36. Minnesota Statutes §§ 14.131 and 14.23 require that the SONAR contain a description of the agency's efforts to provide additional notice to persons who may be affected by the proposed rules. In its SONAR, the Department indicated that it distributed the Request for Comments pertaining to the proposed rule amendments at the September, 1999, human services conference sponsored by the Minnesota Association of Community Mental Health Programs. The audience included health plan representatives, mental health providers, and county social service staff. The Department also sent the Request for Comments via electronic mail to children's mental health collaboratives, mailed notices to county social services directors, met twice with the rules committee of the Minnesota Association of County Social Service Administrators, met with two of the eight prepaid medical assistance program (PMAP) contracted health plans, and convened nine rulemaking advisory committee meetings over seven months to solicit input and criticism as the proposed rules were being developed. The Department also distributed rule drafts to eight contracted PMAP health plan providers, public health nursing committee members, and staff from the Department of Children, Families, and Learning.

37. As discussed more fully above, an additional notice plan was reviewed and approved by the Administrative Law Judge on October 19, 2000. On November 22, 2000, the Department of Human Services mailed the Notice of Hearing and a copy of the proposed rules to all persons and associations on the Department's current rulemaking mailing list as well as to eight health plan providers that provide services relating to the proposed rules; community mental health providers; county social service staff and directors; rulemaking advisory committee members; the Department of Children, Families and Learning; the Department of Health; the Department of Corrections; Providers of Color Network Development Project; Legal Aid Society of Minneapolis; Children's Law Center; PACER, Inc.; and the Minnesota Association of Community Mental Health Programs. Karry Udvig of the DHS met with public health nurses working with the DHS Community Supports for Minnesotans with Disabilities in November of 2000 and discussed the proposed rules with them.[31]

Analysis of the Proposed Rules

General

38. Several comments were received in writing and through testimony at the public hearing. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion has been read and carefully considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. For these reasons, it is unnecessary to engage in a detailed discussion of each part and subpart of the proposed rules in this Report. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. She also finds that all provisions not

specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

39. In this matter, the Department has proposed changes to the rule after publication of the rule language in the State Register. Because of this circumstance, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.[32] The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In reaching a determination regarding whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."[33]

Subpart by Subpart Discussion

9505.0323 – Mental Health Services

40. The proposed rules amend the definition of "mental health services" contained in subpart 1, item Q, to include "family community support services as specified in part 9505.0326, and therapeutic support of foster care as specified in part 9505.0327." No one objected to the proposed amendment. This amendment has been shown to be necessary and reasonable to reflect the additional MA-covered mental health services that are the subject of this rulemaking proceeding and to provide references to the particular rule parts that govern those services.

41. FEAT suggested that a definition of "intensive early intervention/behavior therapy" be added to the proposed rules indicating that this term means "intensive behavior treatment utilizing principles of applied behavior analysis as specified by the National Institute for Mental Health Replication Study for the Young Autism Project." FEAT asserts that the term should be defined because different service thresholds should be established for children receiving intensive early intervention/behavior therapy. The Department rejected this suggestion based upon its view that there is no authority for promulgating a rule specific to a particular treatment modality. As discussed more fully in connection with 9505.0326, subp. 5a, the Administrative Law Judge does not agree that statutory authority is lacking for the Department to promulgate rules relating to particular diagnoses or treatments and differing threshold service levels depending on diagnosis or treatment. The Department may, if it wishes, include the recommended definition in the rules. However, an agency engaged in rulemaking is entitled to make choices between possible approaches as long as the choice made by the agency is rational. If theDepartment continues to prefer to develop

a more general rule rather than developing a rule that makes distinctions depending on a child's diagnosis or choice of treatment, it has the discretion to do so.

9505.0324 – Home-Based Mental Health Services

42. Part 9505.0324 of the rules deals with home-based mental health services ("HBMHS"). The current rules provide that home-based mental health services are "a culturally appropriate, structured program of intensive mental health services" that are provided to a child with severe emotional disturbance who is at risk of out-of-home placement because of an event or condition which exacerbates the child's severe emotional disturbance or a child who is returning from out-of-home placement because of the severe emotional disturbance." The purpose of home-based mental health services, according to the current rules, is aimed at "resolving an acute episode of emotional disturbance affecting the child with the severe emotional disturbance or the child's family, in order to reduce the risk of the child's out-of-home placement, or to reunify and reintegrate the child with the child's family after an out-of-home placement." Such services "are provided primarily in the child's residence but may also be provided in the child's school, the home of a relative of the child, a recreational or leisure setting, or the site where the child receives day care."

43. The proposed rules amend subpart 6, item I of the current rule. Subpart 6 sets forth numerous services that are not eligible for medical assistance payment, along with several exceptions. As originally proposed, the rule amendments added new subitems (3) and (4) to the exceptions set forth in item I. Subitem (3) provides that up to 45 hours of services provided by a Level I mental health behavioral aide within a six-month period and 90 hours of services provided by a Level II mental health behavioral aide within a six month period will be eligible for MA payment without authorization if the services are delivered concurrently with home-based mental health services to a child with severe emotional disturbance, the child is being transitioned into or out of home-based mental health services, and these services are identified in the child's individual treatment plan. Subitem 4 provides that up to 96 hours of mental health crisis intervention and crisis stabilization services per calendar year will be eligible for MA payment as long as the services are provided by a mobile crisis response team under part 9505.0326, delivered concurrently with home-based mental health services to a child with severe emotional disturbance, the child is being transitioned into or out of home-based mental health services, and provision of these services is documented in the child's record.

44. In its SONAR, the Department asserted that it is reasonable under subitem 3 to allow MA payment for home-based mental health services and family community support services provided by a mental health behavioral aide to be provided concurrently for a limited time period because the services are complementary and not duplicative of services already available from other funding sources. The Department pointed out that such services differ in the level of intensity and level of provider qualifications required. The Department further indicated that it is necessary to establish limits for the concurrent provision of home-based mental health services and family community support services because the criteria for each service package are different. The Department indicated that FCSS are designed to provide services for a time-limited period to improve or maintain the child's emotional or behavioral functioning

and to reduce the risk of out-of-home placement. Since this is a transitional service, it is reasonable in the view of the Department to limit the hours of service provided by a Level I mental health behavioral aide (MHBA I) to 45 hours within a six-month period and the hours of service provided by a Level II mental health behavioral aide (MHBA II) to 90 hours within a six-month period because these limits are one half of the limits allowed for the same period under other family community support services, providing sufficient support for the child.

45. In the SONAR, the Department further contended that it is reasonable to allow in subitem (4) the concurrent provision of mental health crisis intervention and crisis stabilization services with home-based mental health services in order to enable the child to make a successful transition from one service package to another during a time when a crisis may occur. The Department explained that the language was added to allow children transitioning from FCSS to home-based mental health services or vise versa to receive mental health crisis intervention and crisis stabilization service provided by a mobile crisis response team during the transition to or out of home-based mental health services. The Department contends that it is reasonable to allow 96 hours per calendar year (which it claims is "half of the limit allowed under family community support services") because that amount of time "should be sufficient to resolve the crisis or to determine that a different level of care is required."[34] If that time frame is not enough to allow the child to return to baseline level, the Department indicated that the child may benefit from a more intensive level of therapy or a more restrictive therapeutic environment.

46. The limits set in 9505.0324, subpart 6(I)(3) and (4) are fixed as half of the limits set in proposed rule 9505.0326, subpart 5a, relating to family community support services. Several interested parties objected to the latter threshold limits. Those objections and the Administrative Law Judge's conclusion that the Department did not establish the need for and reasonableness of the thresholds established in proposed rule parts 9505.0326, subpart 5a as well as 9505.0324, subpart 6(I)(3) and (4), and 9505.0327, subpart 8(I)(3) and (4), are discussed in connection with proposed rule 9505.0326, subpart 5a. See Findings 67 through 84. As noted in Finding 84, because the thresholds established under 9505.0324, subpart 6(I)(3) and (4), were simply fixed as approximately half the levels set in 9505.0326, subp. 5a, with no convincing further explanation of the reason for their selection, the Administrative Law Judge concluded that those levels are also defective for failure to establish need and reasonableness. Suggestions for correcting this defect are noted in Finding 84.

47. In its post-hearing submission, the Department proposed further modifying the language of subpart 6, item I, to include among the services not eligible for MA payment "home-based mental health services to a child or the child's family that duplicate health services funded under part 9505.0323, 9505.0326, or 9505.0327 . . . " (new language underlined). The Department indicated that services provided under parts 9505.0326 (relating to family community support services) and 9505.0327 (relating to therapeutic support of foster care) were added to the proposed rule as exclusions in order to be consistent with similar language in parts 9505.0326 and 9505.0327 prohibiting simultaneous use of services except with specified exceptions. The proposed rule, as modified, has been shown to be needed and reasonable to avoid

duplication of services. The modification does not render the final version of the rule significantly different from the rule as originally proposed.

48. Families for Effective Autism Treatment ("FEAT") argued that the rule amendments should be modified to define Mental Health Behavioral Aide ("MHBA") services as an additional component of home-based mental health service ("HBMHS") governed by Minnesota Rules part 9505.0324. FEAT proposed extensive amendments to part 9505.0324 to accomplish this end. In response, the Department pointed out that Minn. Stat. § 256B.0625, subd. 35, makes it clear that MHBA services are to be added to the family community support services package, and thus concluded that there is no statutory authority for these services to be added to HBMHS. Accordingly, the Department has not made mental health behavioral aide services reimbursable as a HBMHS and declined to include the amendments proposed by FEAT in part 9505.0324. The Department stated that home-based services are more intensive than FCSS and that, ordinarily, a child or family cannot be recipients of both FCSS and HBMHS, citing part 9505.0326, subp. 7(G) of the current rule (which includes among the services that are not eligible for MA payment "family community support services simultaneously provided with home-based mental health services"). The Department acknowledged, however, that, during a time when a child or family is transitioning from one of these services to the other, it would be beneficial for them to be able to receive services from both programs to allow the transition to be made more gradually. While the addition of subitem (3) to part 9505.0324, subpart 7(I) would not add MHBA services to HBMHS, the Department indicated that it would provide an exception to the general prohibition against simultaneously receiving these services by allowing the child who is transitioning to receive HBMHS notwithstanding the fact that they are also receiving mental health behavioral aide services, provided that the amount of those services do not exceed the specified authorization thresholds. New subitem (4) contains a similar allowance for simultaneous receipt of HBMHS with crisis intervention and stabilization services. The Administrative Law Judge concludes that the Department would lack statutory authority to define Mental Health Behavioral Aide services as an additional component of the home-based mental health services that are governed by part 9505.0324. Accordingly, it would be inappropriate to make the amendments to part 9505.0324 proposed by FEAT in this regard.

49. FEAT also proposed that time spent meeting training requirements imposed by the current rule provisions (see, e.g., rule part 9505.0324, subp. 7) should be compensated by MA because requiring individuals to absorb the cost of this training will be a significant deterrent to accepting a position as a Mental Health Behavioral Aide. In addition, FEAT suggested that proposed rule 9505.0324, subp. 8, be modified to require that MA cover MHBA commuting costs to and from the site where home-based mental health services are provided. The Department declined to make the recommended modifications in the rules, and stated that the exclusions the Department proposed are consistent with MA reimbursement policy since MA does not pay for training or meetings. The Department also asserted that coverage of commuting costs is beyond the scope of the Department's rulemaking authority, would constitute a substantial change, and would likely conflict with federal Medicaid law since it does not involve actual services to the client. The Administrative Law Judge concludes that the Department has shown that the exclusion of commuting and training costs from MA

reimbursement is needed, reasonable, and consistent with existing policies and federal requirements. The Legislature in Minn. Stat. § 256B.0625, subd. 35, has made it clear that the Department has the authority to determine by rule the extent to which MA will cover family community support services. Implicit in this authority is a recognition that the Department may properly determine how MA resources will be allocated, based upon appropriate showings of need and reasonableness. Moreover, since the amendments urged by FEAT would involve sections of the current rules that were not originally proposed for amendment as part of this rulemaking proceeding or similar to the subject matter announced in the Notice of Hearing, inclusion of the suggested amendments would render the rule substantially different from that which was originally proposed and would constitute a substantial change under Minn. Stat. § 14.05, subd. 2.

9505.0326 – Family Community Support Services

Subpart 1 – Definitions

50. Item H of the proposed rules removes the definition of "family community support services" set forth in the current rules. Because the amendment to Minn. Stat. § 256B.0625, subd. 35, added new services covered by MA to which this rule is applicable and not all family community support services are covered by MA, a new subpart 1a has been added to clarify that part 9505.0326 governs MA payment of the family community support services set forth in Minn. Stat. § 245.4871, subd. 17(3)-(6) and 256B.0625, subd. 35. There were no objections to this change. The Department has shown that it is needed and reasonable to move the clarifying language under a new heading. The new language serves to explain the relationship between the rule part and the statutory requirements.

51. Definitions of "individual behavioral plan," "mental health behavioral aide," "mental health crisis intervention and crisis stabilization services", "mobile crisis response team," "preschool program," and "therapeutic camp program" were added to subpart 1, items H, J, K, L, M, and O. The definitions are needed and reasonable to describe the services to be performed by a new category of paraprofessionals (mental health behavioral aides), who will work under the direction of a mental health professional or a mental health practitioner under the clinical supervision of a mental health professional to implement the mental health services identified in a child's individual treatment plan and individual behavior plan. The definitions are also needed and reasonable to define a new service that is being added (mental health crisis intervention and crisis stabilization service), and identify the personnel who will provide that service (the mobile crisis response team). It is also needed and reasonable to define "preschool program" and "therapeutic camp program" because Minn. Stat. § 256B.0625 required that therapeutic components of a preschool program and a camp program be added to the family community services support package.

52. Mary Jo Verschay of the Ramsey County Children's Mental Health Collaborative asked whether the mental health crisis intervention and crisis stabilization services defined in item K are replacements for crisis assistance services defined and discussed in part 9505.0326, subpart 1, item E. The Department responded that the newly defined services do not replace crisis assistance. The Department pointed out

that crisis assistance services are activities that assist the child, his or her family, and service providers in recognizing factors precipitating a mental health crisis and identify behaviors related to the crisis. The Department indicated that crisis assistance components include crisis risk assessment, screening for hospitalization, referral and follow-up to suitable community resources, and planning for crisis intervention.

Subpart 2 – Eligible Providers of Family Community Support Services

53. Among other things, subpart 2 of the current rules provides that a provider under contract to a county board is eligible to provide family community support services and specifies that a provider under contract to the county board to render FCSS must provide the required services, such providers may not contract for FCSS with another party, and the persons who provide the services must be employees of the provider under contract with the county board. The Department originally proposed to amend this language to provide that "[a] provider under contract with a county board must provide the required services and may not assign any rights or obligations under its contract with the county board to a third party. For purposes of this item, 'third party' means persons who are not employees of the entity under contract with the county board." In its SONAR, the Department indicated that the changes were made to clarify the rule part and make it consistent with the wording of part 9505.0324, subp. 2. The new language was intended to clarify the fact that only a county board or providers who contract with a county board may provide family community support services, and that providers are prohibited from subcontracting with another entity.

54. Several parents of children with autism, including Lisa Helt, Diane Hauptman, Mary Norby, Darren Carroll, Amy Ferrell, Diane Halpin, Wendy, Angela Pfeifer, Jeff Meyer, Doreen True, Karl Ahlgren, Asea Cole, and Jack Halpin, testified at the hearing and/or submitted written comments concerning the difficulties they have had ensuring that their children receive intensive early intervention/behavior therapy due to the failure of their providers to obtain contracts with counties in a timely fashion.

55. At the hearing and in its post-hearing submissions, FEAT suggested that host-county contracting language be added to both the family community support services and the home-based mental health services rule parts (9505.0326, subp. 2(D) and 9505.0324, subpart 2(D)). Under FEAT's proposal, a provider would be eligible to provide services "if it contracts with the county in which the provider is located (the host county), regardless of the county of residence of the child." FEAT stated that it believes that the DHS had used a host-county approach in the past (i.e., DHS had allowed the provision of services as long as there was a contract between the provider and the county where the provider resided) and then suddenly began interpreting the rules more restrictively to require separate contracts for each county in which children were receiving services. FEAT pointed out that the separate contract requirement has been a substantial obstacle to treatment for families served by FEAT, and argued that a change is necessary to ensure that critical resources are not sapped by the effort required to obtain 87 different contracts. FEAT indicated that it did not believe that the language of the existing rules required the approach urged by the Department.

56. In its post-hearing responses, the Department disagreed with this assessment and pointed out that there is no statutory authority to use a host-county

approach regarding MA-covered children's mental health services apart from Minn. Stat. § 256B.0625, subd. 20, which specifies that payment for mental health case management provided by county-contracted vendors is to be based on a monthly rate decided by the host county. The Department also indicated that the contract language in the proposed rule amendments was changed from the rule as currently written to make FCSS contracting language for eligible providers consistent with language added to the home-based mental health services package (in part 9505.0324) by a statutory grant of expedited rulemaking authority in 1999.

57. Patricia Siebert, an attorney with the Minnesota Disability Law Center ("MDLC"), argued in hearing testimony and in post-hearing written comments that clients' ability to freely choose providers under the proposed rules is limited by the fact that county boards are assigned the major responsibility and authority for offering mental health services and by the requirement that providers must contract with each one of the counties for which it provides services rather than working with one lead county that monitors services under the same contract for many counties. MDLC asserted that the proposed rule amendments are not needed or reasonable based upon its belief that restricting eligible providers to the county or to a provider under contract with the county violates federal Medicaid requirements that recipients be given free choice of providers. MDLC emphasized that families in a number of counties are unable to access FCSS because their county will not contract with a provider and the county does not itself provide this service, while individuals in other counties are readily able to access FCSS. It contended that this outcome violates federal requirements that Medicaid services be provided to recipients statewide with reasonable promptness and that the services be equal in amount, duration and scope for all persons within the categorically needy or medically needy groups. MDLC suggested that the language in the proposed rules be changed to mirror an alternative approach that is being developed by DHS's Division of Adult Mental Health in cooperation with counties and other interested parties. The alternative approach would use a certification process for providers and would allow greater flexibility in where and by whom mental health services can be provided. Specifically, MDLC suggested that the rule state: "The county shall review a provider's compliance with the requirements of Minn. R. 9505.0326, subp. 4, and shall certify providers meeting the requirements of the subpart. A certified provider may subcontract family community support services but must maintain responsibility for the services and for billing." MDLC contended that the Department does not need legislative authority to modify the rules as it suggested, emphasizing that federal law authorizes DHS to place appropriate limits on Medicaid benefits and state law authorizes DHS to make "uniform rules, not inconsistent with law, for carrying out and enforcing the provisions hereof in an efficient, economical, and impartial manner, and to the end that the medical assistance system may be administered uniformly throughout the state . . . ." MDLC also asserted that its proposed modification would not constitute a substantial change from the rule as originally proposed.

58. In response, the DHS noted that it agreed with the approach being developed to work toward a provider certification process. The Department expressed its belief that it would not be possible to incorporate the approach in the current proposed amendments because legislative authority is lacking. In addition, the

Department stated that the certification approach has not been finalized. If the option is funded and statutorily authorized in the 2001 legislative session, the Department noted that it would consider incorporating the approach into a planned major revision of the DHS rule parts governing MA payments to providers that is likely to begin in 2001. The Department pointed out that the existing rule language already prohibits subcontracting with a third party and the amendments were merely intended to state this already-existing ban more clearly. The Department disagreed that the proposed amendments established or added to the restrictions cited by MDLC, but asserted that they merely restate restrictions that have been approved by the federal Health Care Finance Administration (HCFA) and by the Administrative Law Judge who approved the current rule provisions in 1996. The Department also disagreed that it would have authority to make the modification suggested by MDLC because, at a minimum, it believed that such a modification would be a substantial change from the rules as originally proposed.

59. Julie Ladeen, a planner with Anoka County Community Social Services – Mental Health, expressed concern that the role of the county in contracting with vendors, monitoring services, and billing MA remained unclear under the proposed rules. Ms. Ladeen asserted that counties have potential liability under the present rule and that expanded services would enlarge this potential liability, and suggested that the rule should state that billing for MA should be the responsibility of the provider and not the county. In response, the Department indicated that Ms. Ladeen's concerns would be addressed in the discussions about the certification options. The Department stated that billing MA is the provider's responsibility in the current rule and pointed out that the proposed amendments do not change that fact. In addition, the Department contended that any county liability that exists with respect to family community support services is part of the county's authority and responsibility as the local mental health authority and is not affected by the proposed rule amendments.

60. Mary Jo Verschay of the Ramsey County Children's Mental Health Collaborative indicated that, even though family community support services providers in Ramsey County are contracted by the collaborative, providers cannot bill for these proposed services because they do not have a contract with the county. Ms. Verschay also noted that the collaborative contracts for behavior aides and the proposed rules do not allow subcontracts. The Department acknowledged that the proposed rule does not allow for subcontracting but points out that this is not a change from the current rule. In the view of the Department, billing and contracting issues are beyond the scope of the present rulemaking proceeding and would be appropriately addressed in the future consideration of broader amendments to Rule 47.[35]

61. In response to a question from Ms. Verschay, the Department clarified that providers who meet the criteria listed in subpart 2 qualify to enroll as Minnesota Health Care Program family community support services providers if they also meet the requirements of subpart 4 of 9505.0326. The Department stated that a provider who meets the requirements described in these two subparts may choose to provide some or all of the family community support services identified in the proposed rules.

62. In its February 1, 2001, reply, the Department agreed that some of the access and administrative problems identified by testimony and submissions in this

rulemaking proceeding require attention and indicated that it believed that the provider certification approach urged by the Minnesota Disability Law Center offered the best approach to broaden the range of providers while ensuring that they are qualified. Although the Department disagreed with the objections raised to the proposed amendments, it modified the proposed rules by withdrawing all of the amendments that it had proposed to subpart 2. Subpart 2 thus would remain in its current form, as set forth below:

> Subpart 2. **Eligible providers of family community support services.** The entities in items A and B are eligible to provide family community support services if they meet the requirements of subparts 4 to 6:
>
> A. a county board; or
>
> B. a provider under contract to a county board.
>
> For purposes of this subpart, "county board" means the county board of commissioners or a board established under Minnesota Statutes, sections 402.01 to 402.10, or 471.59. A provider under contract to the county board to render family community support services must provide the required services and may not contract for family community support services with another party. The persons who provide the services must be employees of the provider under contract to the county board for the family community support services. Notwithstanding the definition in part 9505.0175, subpart 12, "employee" means a person employed by a provider who pays compensation to the employee and who withholds or is required to withhold federal and state taxes from the employee's compensation. An employee is not a self-employed vendor or independent contractor who has a contract with a provider.

63. The Department has the discretion to withdraw its proposed amendment to subpart 2 in response to comments made during the rulemaking proceeding and seek to obtain legislative authority to take the provider certification approach suggested by the Minnesota Disability Law Center. The need for and reasonableness of the current rule language was established in a prior rulemaking proceeding. The withdrawal of this rule amendment does not affect any other provision of the proposed rules.

Subpart 4 – Provider Responsibilities

64. As originally proposed, this subpart of the proposed rules changed the heading from "eligibility of medical assistance payment" to "provider responsibilities" to clearly show what was encompassed in the subpart, added the term "mental health practitioner" to clarify the rule, and added a reference to a "collaborative family service plan" to refer to the multi-agency plan of care issued under Minn. Stat. § 245.492, subd. 16. The proposed rules also included in item D a requirement that crisis assistance and mental health crisis intervention and crisis stabilization services provided outside of hospital inpatient settings must be coordinated with emergency services. In addition, the proposed rules added a new item G that required that providers recruit, train and supervise MHBAs, conduct a background study of each potential candidate for a MHBA position that includes a search of information from the criminal justice data

communications network in any state where the subject of the study has resided, and not hire the individual if the background information disqualifies him or her under Minn. Stat. § 245A.04, subd. 3d. In its SONAR, the Department indicated that the background check was required to protect children's safety because the MHBA will be expected to have one-on-one direct contact with children. Even though the FCSS program is not a licensed program, the Department asserted that it was reasonable to subject the MHBA to the same standards required of license program personnel who have direct contact with customers and logical to subject them to the same disqualification criteria. The proposed rules also include in item H a requirement that providers that offer mental health crisis intervention and crisis stabilization services must ensure that such services are available 24 hours a day, seven days a week. In the SONAR, the Department asserted that this item is necessary to establish a uniform standard that providers must meet, and contended that it was reasonable to require the extensive hours because crisis situations do not necessarily conform to normal business hours.

65. In its post-hearing submission, the Department proposed modifying the language of the first sentence of subpart 4 as follows: "To be eligible for medical assistance payment, the provider of family community support services as specified in subpart 2 must meet all the requirements in items A to F and must also meet the requirements in items G and H if they apply" (new language underlined). As originally proposed, the rule required that providers meet the requirements in items A to H. The Department indicated that the requirements set forth in items G and H are conditioned upon the type of service the provider provides, and contended that the rule modification is an editorial change to correct an editorial oversight, not a substantial change. The Department has established that subpart 4 of the proposed rule, as modified, is needed and reasonable to explain the requirements that providers of FCSS must meet to be eligible for MA payment. The modification made in the Department's post-hearing submission serves to clarify the rule and does not result in a rule that is substantially different from the rule as originally proposed.

66. FEAT suggested that the rules be revised to provide that the cost of background checks regarding potential candidates for MHBA positions that are required under subpart 4(G)(2) will be reimbursed by DHS. The Department indicated in response that this suggestion is beyond the scope of the Department's rulemaking authority, would constitute a substantial change, and would likely conflict with federal Medicaid law since background check costs do not involve actual services to the client. While the Department may, if it wishes, consider modifying the rules to provide for reimbursement of these costs, the proposed rules are not rendered unreasonable by their failure to include a reimbursement requirement.

Subpart 5a – Qualifications of Mental Health Behavioral Aide and Service Criteria

67. The proposed rules add a new subpart 5a to part 9505.0326 relating to the qualifications of the newly-established Mental Health Behavioral Aide Levels I and II and the scope of services that they will provide. This subpart was the subject of much of the critical comment concerning the proposed rules.

Item A

68. Item A of the proposed rules provides that the services provided by mental health behavioral aides will be paid at one of two rates, depending upon the qualifications of the aide. Under item A(1), a Level I MHBA must be at least 18, hold a high school diploma or GED or have two years of experience as a primary caregiver to a child with serious emotional disturbance within the prior ten years, and meet orientation and training requirements set forth in subpart 8. Under Item A(2), a Level II MHBA must be at least 18, have an associate or bachelor's degree or 4,000 hours of experience in delivering clinical services in the treatment of mental illness of children or adolescents, and meet the orientation and training requirements set forth in subpart 8. The proposed rules go on to specify in item A(3) that Level I MHBA services are limited to 90 hours within a six-month period without authorization and Level II MHBA services are limited to 180 hours within a six-month period without authorization. The proposed rules state that "[a]uthorization is needed in order to exceed each limit during any calendar year." In its SONAR, the Department stated that the service limitations set in the proposed rule "are reasonable because they are between the limit for skills training under family community support services and home-based mental health services."

69. FEAT contended that the rule should not create distinctions between the types of services that may be provided by Level I and Level II MHBAs or the number of hours of service that may be provided without further authorization. FEAT recommended that the rule simply provide for a total number of hours to be provided by MHBAs in general (unless authorization were obtained to exceed that total). In the SONAR, the Department indicated that it is reasonable to create two levels of MHBAs and base their compensation on their qualifications. The Department stated that this approach reflects the need for different levels of knowledge and skills required to care for a child in order to carry out the goals and objectives identified in the child's treatment plan. The Department emphasized that some children require a more intensive level of care and thus would require the assistance of a Level II MHBA who has more knowledge and skills. In addition, the Department asserted that the two levels of compensation will attract people with more knowledge and experience to the profession and offer advancement opportunities for entry level aides as they acquire more experience. In its January 17, 2001, response, the Department indicated that the public advisory committee for the rule amendments believed that it was reasonable to establish two levels of compensation for the mental health behavioral aides because meeting the needs of children's treatment plans require differing levels of knowledge and experience. The Department pointed out that differing levels of knowledge and experience are typically recognized by a differential in compensation as is the case with mental health practitioners and mental health professionals. The Department indicated that establishing two levels of compensation also supports recruiting and retention efforts because there is an opportunity for advancement for entry level aides who want to remain in the mental health field, and emphasized that recruiting and retention are crucial elements in establishing and applying this new service option successfully. The Department also indicated in its posthearing responses that it believes that FEAT's concern is mitigated by the fact that the rule sets forth authorization thresholds and not absolute limits on the number of hours that can be provided.

70. The Administrative Law Judge concludes that the Department has demonstrated that it is necessary and reasonable as a general matter for the rule to

create distinctions between the types of services that may be provided by Level I and Level II MHBAs and the number of hours of service that they may provide without prior authorization in order to address the differing needs of children, encourage individuals to enter the field, and retain those who achieve greater training and experience by affording them a higher rate of compensation.

71. Several interested parties, including the MDLC, FEAT, and Sonja Kerr (an attorney who has represented many families who have children with autism), objected to the specific service thresholds set in the proposed rule for MHBA Level I and II services. The MDLC argued that the Department had not established that they were reasonable for children with autism or for children with other health needs. MDLC concluded that the Department had merely looked at the limits for two other in-home mental health services and split the difference. It pointed out that the Department had not presented any medical or clinical bases supporting the service limits it set for this medical benefit, and pointed out that the only testimony existing in the record (i.e., the information provided by FEAT) presented a clinical analysis overwhelmingly supporting much higher service limits for children with autism. The MDLC asserted that an arbitrary limit that is not based on the clinical needs of most people needing the service "will result in many people jumping through the hoop of prior authorization or simply giving up and not obtaining sufficient amounts of this service to meet their medical need."[36]

72. FEAT counsel (Karen Cole), parents of children with autism (including Lisa Helt, Diane Hauptman, Mary Norby, Darren Carroll, Amy Ferrell, Diane Halpin, Wendy, Angela Pfeifer, Jeff Meyer, Doreen True, Karl Ahlgren, Asea Cole, and Jack Halpin), and those with expertise in a treatment modality known as applied behavior analysis or "ABA" (including Dr. Gail Peterson of the University of Minnesota's Department of Psychology, Dr. Eric Larsson, Executive Director of FEAT of Minnesota, and Karin Kispert, Clinic Supervisor and Behavior Therapist with FEAT), made a presentation at the hearing and/or submitted written comments concerning the effects of autism on children, the effectiveness of ABA, the problems of service fragmentation in the current services delivery system, the costs associated with caring for children with autism, and the difficulty in attracting and retaining qualified therapists to work with children with autism. These individuals emphasized that the costs associated with intensive early intervention will, in many instances, mean cost savings to the State in the long run. Dr. Peterson testified that the University of Minnesota's Center for the Study of Autistic Spectrum Disorders recommends ABA, as do national organizations and professional groups. FEAT provided a letter at the hearing from Dr. Elsa Shapiro and Dr. Blythe Corbett of the University of Minnesota's Division of Pediatric Neurology indicating that "[t]he Autism Spectrum Disorders Program often recommends that young children with autism spectrum disorder receive an intensive ABA program to be implemented in the home environment for up to 40 hours per week. We consider ABA to be the current research, clinical and community standard treatment for children with autism spectrum disorders."[37] FEAT also provided an excerpt from a 1999 report of the Surgeon General indicating that "[i]ntensive, sustained special education programs and behavior therapy early in life can increase the ability of the child with autism to acquire language and ability to learn" and stating that "[t]hirty years of research demonstrated the efficacy of applied behavioral methods in reducing inappropriate

behavior and in increasing communication, learning, and appropriate social behavior."[38]

73. Based upon this testimony and evidence, FEAT argued that the threshold limits proposed by the Department for MHBA Levels I and II are not adequate for children on the autistic spectrum receiving intensive behavior treatment. FEAT proposed that the rules be modified to provide for two levels of treatment: one level for children on the autistic spectrum, and another level for other children. Under FEAT's proposal, the allowable MHBA limits would be increased to up to 900 hours for behavior therapist services within a six-month period for children on the autistic spectrum being treated with intensive early intervention/behavior therapy, plus up to 100 hours for clinical supervisor services within a six month period, and 375 hours for senior therapist services within a six-month period. FEAT also suggested including an expanded version of the amendments proposed for part 9505.0326 (relating to family community support services) in part 9505.0324 (relating to home-based mental health services.) FEAT also argued that the Department had not established the reasonableness of the proposed hours of treatment for children generally.

74. Ms. Kerr also testified at the hearing that children with autism need intensive early intervention. She emphasized the difficulties parents encounter in fighting for funding. Ms. Kerr suggested that the DHS ensure interagency participation and use early intervention committees as a starting point for putting together an intensive program.

75. In its January 25, 2001, post-hearing submission, the Department emphasized that the thresholds set in the proposed rules merely establish the point at which authorization is required in order to evaluate the medical need for continuation of the services. The Department emphasized that these thresholds are not absolute limits on the amount of service available. The Department indicated that it decided to follow the prior authorization threshold framework already established for family community support services that are currently reimbursable by MA. The Department pointed out that, under the current framework, many covered services require authorization at some point. The Department contends that the authorization requirement is used to safeguard against inappropriate and unnecessary use of health care services governed by state and federal regulations. The Department indicated that the rule advisory committee was "well aware of the need to find a reasonable balance of length and frequency of service required by most children" when setting these thresholds, to "avoid the risk of needing more intensive services than FCSS or out-of-home placement." The Department indicated that the service thresholds "were set with the intent of providing flexibility for a wide diagnostic base and multiple treatment options." For general guidance, the Department indicated that it "looked at current thresholds for children accessing more intensive services such as day treatment and home-based mental health services" and "also considered the thresholds for skills training under family community support services." The Department indicated that, because FCSS is available to all children with severe emotional disabilities whose conditions and needs for services could span a broad range, it would be impractical to base a "one-size-fits-all" prior authorization limit on clinical data. However, the Department noted that

"clinicians on the advisory committee participated in setting the limits and believed that the limits were consistent with clinical realities and practitioners' expectations."[39]

76. After receiving the Department's January 25, 2001, submission, MDLC continued to object to the service limits because the Department did not provide written documentation of the discussions with clinicians on the advisory committee, reveal the parameters of what was considered to be "clinical realities" and "practitioner expectations," or indicate whether any disagreement may have been voiced. In the view of the MDLC, the Department has not fulfilled its legal obligation to establish the appropriateness and reasonableness of the limits established in the proposed rules since it has not provided any clinical or other medical bases relating to the clinical needs of most persons who would receive the service, or any other community standards of care. In addition, MDLC provided two pages from the Advisory Committee's Draft Guidelines dated January 31, 2000, and April 24, 2000, which show that the committee earlier was considering much higher levels of behavioral aide services (728 hours per six-month period).[40] MDLC emphasizes that the Department has not explained why these higher numbers were later rejected.

77. In its February 1, 2001, submission, the Department stated that, in its opinion, "trying to set a prior authorization threshold that would be appropriate for all children with severe emotional disorders based on clinical criteria would be futile. Clinical bases may be useful when establishing limits for specific diagnostic classifications, in combination with other specific parameters (age, functional level, etc.). The present rule, however, encompasses a wide range of diagnostic groups, ages, and other variables, such that no singular clinical standard could possibly exist." The Department continues to emphasize that the thresholds merely establish the point at which providers would have to seek further authorization to provide additional services and do not place a limit on the amount of service a recipient could receive. The Department thus contends that there is no requirement that the thresholds be clinically based. The Department argues that the threshold is a reasonable utilization control. It dismisses as mere speculation the MDLC's contention that recipients would give up and settle for fewer hours than they need and points out that, even though all PCA services must be authorized in advance, virtually all of the families participating in the hearing have received PCA services. The Department asserts that it attempted to set a reasonable threshold for hours by looking at other contexts in which the same determination had been made and appropriately placing the thresholds relative to the limits identified in those contexts. The Department further argues that the rule provides a reasonable estimate, based on "the outcomes of comparable estimates," of the point at which service delivery should be examined on a case-by-case basis before deciding that more services should be made available.

78. In response to the concerns raised by FEAT, affected parents, and Ms. Kerr, the Department emphasized that the purpose of the rule amendments is not to solve the preexisting problem faced by parents of autistic children in meshing the requirements of the MA system with their desire to provide a particular type of therapy (ABA) or to assure full MA payment for ABA. Rather, the purpose is to add as MA-covered services the services specified by the Legislature. While the Department acknowledged that the modifications proposed by FEAT would provide relief for some of

the difficulties described by FEAT members, the Department responded that it does not have the authority to add the modifications suggested by FEAT to the home-based mental health services package. DHS emphasized that, under Minn. Stat. § 256B.0625, subd. 35, it is clear that the new services in question are to be added as family community support services. Even if there were authority to add the suggested services as home-based mental health services, the Department believes that it would not have the authority to establish higher separate prior authorization thresholds for children with autistic spectrum disorders or for children wishing to receive a particular treatment modality such as intensive early intervention/behavior therapy or ABA. FEAT responded that simply because the rules are not presently structured for particular diagnostic or population groups does not mean that they cannot be so structured if that is reasonable and necessary. FEAT maintains that the evidence it submitted establishes that autistic children require more intensive services than the rules provide. It also contends that, where the evidence shows that a set of services are needed for a particular condition, it should not be necessary to go through the prior authorization process for each child.

79. The current version of many of the Department's rules governing MA payment (including the current family community support service rule) specifies that prior authorization is necessary to obtain payment for a service or exceed a specified threshold.[41] The Department's current rules also include provisions that explain the procedures that a provider must follow to obtain prior authorization from the Department, the Department's responsibilities in considering that information, criteria for approval of the request, and the appeals process.[42] The general choice made by the Department to set service thresholds and require prior authorization for hours exceeding hours specified in the rule is one that a rational person could have made and is within the agency's policy-making discretion.[43] Moreover, the Legislature indicated in Minn. Stat. § 256B.0625, subd. 35, that MA covers the specified services as family community support services "to the extent authorized by rules promulgated by the state agency," thereby vesting in the Department the authority to define by rule the extent to which FCSS would be covered by MA. The Administrative Law Judge thus concludes that the Department has shown that it is needed and reasonable for the Department to set service thresholds and use a prior authorization approach in connection with the services encompassed by the proposed rules in order to guard against the inappropriate or unnecessary use of health care services governed by state and federal regulations.

80. As discussed previously, the Administrative Law Judge does not agree with the Department's view that it lacks statutory authority to promulgate rules that set differing service levels depending on diagnosis or treatment and is thereby precluded from adopting a rule that sets a threshold service letter for services provided to children with autism. Such an approach is not prohibited explicitly or implicitly by the governing statute. Accordingly, the Department may, if it wishes, choose to develop rules that set differing service levels depending on the diagnosis or treatment of the child. An agency engaged in rulemaking is, however, entitled to make choices between possible approaches as long as the choice made by the agency is rational. Therefore, if the Department continues to prefer to develop a more general threshold service level in the rule rather than developing differing threshold levels depending on a child's diagnosis or choice of treatment, it has the discretion to do so. Moreover, under the circumstances

of this particular rulemaking proceeding, the Administrative Law Judge does not believe that a rule that sets one threshold for the majority of children and a second, higher threshold for children with autism would be within the scope of the matter announced in the Notice of Hearing or that the Notice of Hearing provided fair warning that the outcome of the rulemaking proceeding could be a rule that makes such a distinction. Instead, such a rule would be substantially different than the rule that was originally proposed within the meaning of Minn. Stat. § 14.05, subd. 2. While the Notice of Hearing provided fair warning that general threshold service levels for MHBAs Levels I and II would be established by rule, it did not, in the view of the Administrative Law Judge, provide fair warning that a separate threshold service level for MHBAs providing intensive early intervention/behavior therapy services to children with autism would be established by rule. There was no mention of ABA or treatment of children with autism in the proposed rule or in the SONAR. Persons with a particular interest in this area and persons who may oppose intensive early intervention/behavior therapy or disagree with the service hour threshold urged by FEAT and others in this proceeding would not have understood that the rulemaking proceeding could affect their interests. Thus, although the Department is not precluded from adopting such a rule in the future based on proper notice and compliance with the Administrative Procedure Act, adoption of the rule suggested by FEAT in the current rulemaking proceeding would result in a prohibited substantial change from the rule as originally proposed.

81. The Administrative Law Judge must further consider whether the particular service thresholds selected by the Department in the proposed rules have been shown to be needed and reasonable by an affirmative presentation of facts. To make this evaluation, it is necessary to consider the Department's rationale for selecting those thresholds. As mentioned above, the Department initially contended in its SONAR that the MHBA thresholds "are reasonable because they are between the limit for skills training under family community support services and home-based mental health services." The current rule part relating to skills training for FCSS provides that more than 68 hours of individual, family, or group skills training within any consecutive six-month period will not be eligible for MA payment.[44] The current rule part pertaining to skills training for home-based mental health services provides that more than 192 hours of individual, family, or group skills training within a six-month period will not be eligible for MA payment.[45] In its post-hearing submissions, the Department indicated that it also looked for general guidance at current thresholds for children accessing "more intensive" services such as day treatment and home-based mental health services. The current rulesprovide that MA payment for day treatment services are limited to 390 hours of day treatment in a calendar year unless prior authorization is obtained,[46] and exclude from MA coverage "more than 192 hours of individual, family, or group skills training [relating to home-based mental health services] within a six-month period" as well as "home-based mental health services that exceed 240 hours in any combination of the psychotherapies and individual, family, or group skills training within a six-month period."[47]

82. The Department is obligated to support its proposed rules with an affirmative showing of need and reasonableness. For an agency to make the required showing of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved.[48] These facts may be either

adjudicative facts or legislative facts.[49] The agency must show that a reasoned determination has been made.[50]

83. As is evident from the discussion above, the Department has not clearly stated the basis for its selection of the service thresholds for Level I and Level II MHBAs. The Department initially stated in the SONAR that the thresholds in the proposed rules were "reasonable because they are between the limit for skills training under family community support services and home-based mental health services." In its post-hearing submissions, the Department stated on the one hand that the rule advisory committee was "well aware of the need to find a reasonable balance of length and frequency of service required by most children" and clinicians on the committee "believed that the limits were consistent with clinical realities and practitioners' expectations" and stated on the other hand that it would not be feasible to rely on clinical data when considering a limit for a wide range of diagnostic groups and ages and it simply "looked at current thresholds for children accessing more intensive services such as day treatment and home-based mental health services" in arriving at the thresholds in the proposed rules and "also considered the thresholds for skills training under family community support services." The Department's mere indication in its post-hearing comments that "clinicians on the advisory committee participated in setting the limits and believed that the limits were consistent with clinical realities and practitioners' expectations"[51] without any more detailed explanation or supporting testimony, fails to explain the rationale for the proposed rule and does not serve as the sort of affirmative presentation that justifies the proposed rule, particularly in light of evidence that the advisory committee was apparently considering a much higher threshold during 2000. Moreover, the Department did not explain in its SONAR or post-hearing submissions why skills training thresholds would be relevant in setting the thresholds for actual provision of services to children, why it would necessarily view the provision of day treatment or home-based mental health services as "more intensive" than family community support services, or how these services levels are comparable to MHBA service levels. As noted above, the agency is required to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[52] The Department has failed to provide such an explanation in this proceeding, despite the fact that several interested parties raised concerns and questions at the hearing and in post-hearing comments about the selection of the service thresholds. Although the Administrative Law Judge does not believe that the Department is necessarily required to rely upon "clinical" evidence to support the proposed rule, the Department is obliged to present facts demonstrating the existence of some rational basis for selecting the specific thresholds it has proposed. As a result, the Administrative Law Judge concludes that the Department has failed to show the need for and reasonableness of the portion of the proposed rules setting the service thresholds for Mental Health Behavioral Aides. This provision of the proposed rules thus is defective. In addition, because the thresholds established under 9505.0324, subparts 6(I)(3) and (4), and 9505.0327, subpart 8(I)(3) and (4), were simply fixed as approximately half the levels set in 9505.0326, subp. 5a, with no convincing further explanation of the reason for their selection, the Administrative Law Judge concludes that those levels are also defective for failure to establish need and reasonableness.

84. If a defect is found in the proposed rules, the Administrative Law Judge must suggest action that the agency may take to cure the defect. In the present instance, the only evidence presented at the hearing supported a much higher threshold level with respect to children with autism who receive intensive early intervention/behavior therapy. This threshold level was not, however, supported with respect to the general population of children who will be eligible to receive the services of MHBAs and, as discussed above, the Department's decision to follow an approach that is not diagnosis-specific is within its policy-making discretion. There is not sufficient information in the record of this rulemaking proceeding to support any specific threshold service level for the general population of children who will be eligible to receive the services of MHBAs. Thus, to cure the defect, the Administrative Law Judge suggests that the Department withdraw the portions of the proposed rules pertaining to the establishment of service threshold levels as set forth in the first three sentences of parts 9505.0326, subp. 5a(A)(3). The Administrative Law Judge further suggests that the Department withdraw the references to threshold levels contained in 9505.0324, subpart 6(I)(3) and (4), and 9505.0327, subpart 8(I)(3) and (4). The Department may, in the alternative, decided to withdraw more of the proposed rules or even the entire set of proposed rules.[53] It is recommended that the Department consider what the service thresholds should be, with or without the assistance of an advisory committee, and eventually issue a new notice for a further rulemaking proceeding to address these threshold levels accompanied by a SONAR that clearly explains the rationale for the threshold ultimately proposed by the Department.

85. As originally proposed, the last sentence in item A(3) provided that "[t]he same child may not receive Level I and Level II mental health behavioral aide services concurrently." FEAT objected to this provision and argued that it is necessary to use multiple staff members in intensive therapy. FEAT pointed out that it was unclear whether the rule was meant to preclude the receipt of Level I and Level II MHBA services during the same general time period or at precisely the same time. FEAT argued that regular meetings with the entire treatment team and family are an important element of intensive early intervention/behavior therapy provided to children with autism. FEAT thus recommended that the proposed rules be amended to specify that the simultaneous provision of services by mental health professionals and practitioners should not be excluded from MA reimbursement when needed for training, supervision, or coordination of staff.

86. The Department declined to modify the proposed rule in the manner suggested by FEAT but did not explicitly discuss the reason. The Department indicated that, in considering the concerns expressed by FEAT with respect to the proposed rule, it concluded that the language in the proposed rule was ambiguous and should be changed to reflect the Department's intended meaning that two behavioral aides would not be working face-to-face with the same child at the same time. Thus, the Department indicated that, under the proposed rule, there would not be two behavioral aides with the child at the same time at the child's school or at home, although there might be two or more aides who work with the child at different times during the day. In its post-hearing submission, the Department proposed modifying item A(3) by deleting the last sentence and replacing it with the following language: "Hours of service from both a Level I mental health behavioral aide and a Level II mental health behavioral aide

can be applied to the care of the same child if specified in the individual treatment plan, but not during the same session or visit with the child. Medical assistance covers the cost of services of only one mental health behavioral aide, regardless of level, for any one session or visit with the child."

87. The Administrative Law Judge concludes that the Department has shown that the exclusion of hours of service simultaneously provided by both a Level I MHBA and a Level II MHBA during the same session or visit is needed and reasonable. The Legislature in Minn. Stat. § 256B.0625, subd. 35, has made it clear that the Department has the authority to determine by rule the extent to which MA will cover family community support services. Implicit in this authority is a recognition that the Department may properly determine how MA resources will be allocated, based upon appropriate showings of need and reasonableness. The proposed rules are not rendered unreasonable by their failure to require MA payment for the simultaneous provision of services by more than one MHBA during the same visit or session when needed for training, supervision, or coordination of staff. The modification proposed by the Department clarifies the rule provision and does not result in a rule that is substantially different than the rule as originally proposed.

Item B

88. Item B of subpart 5b identifies the types of services that can be provided by a MHBA. The rule as proposed states that '[m]edically necessary services provided by a mental health behavioral aide are designed to improve the functioning of the child and support the family in activities of daily and community living." The proposed rules further require that the MHBA document the delivery of these services via written progress notes and that goals in the treatment plan be implemented to allow the child to acquire developmentally and therapeutically appropriate daily living skills, social skills, and leisure and recreational skills through targeted activities. These activities may include assisting the child with skill development in dressing, eating, and toileting; assisting the child in completing tasks; observing and redirecting inappropriate behavior; assisting the child in using self-management skills relating to the child's emotional disorder or mental illness; implementing de-escalation techniques; implementing any other mental health service that the mental health professional has approved; or assisting the parents to develop and use parenting skills that help the child achieve the goals outlined in the child's individual treatment plan or individual behavioral plan. In its SONAR, the Department indicated that FCSS are designed to improve the ability of a child with severe emotional disturbance to manage basic activities of living, function appropriate in home, school and community settings, participate in leisure or community activities, reside with family in the community, and participate in after-school and summer activities. The Department indicated that the services to be provided by a MHBA must be medically necessary, as required of all services covered by MA, and should focus on activities of independent daily living and socialization skills that enable the child to reduce dysfunctional behavior and develop skills necessary to function appropriately in home, school, community, and other settings.

89. The Administrative Law Judge recommends that the second sentence of item B be revised slightly to clarify the intent of the provision and improve its readability. As originally proposed, this sentence states: "Delivery of these services must be

documented by the mental health behavioral aide via written progress notes and must implement goals in the treatment plan for the child's severe emotional disturbance that allow the child to acquire developmentally and therapeutically appropriate daily living skills, social skills, and leisure and recreational skills through targeted activities which may include" seven enumerated types of activities. While the rule is not defective as written, the second clause of the sentence is somewhat unclear. The Judge recommends that the agency consider modifying it to include language similar to the following:

> Delivery of these services must be documented by the mental health behavioral aide via written progress notes. The mental health behavioral aide must implement goals in the treatment plan for the child's severe emotional disturbance that allow the child to acquire developmentally and therapeutically appropriate daily living skills, social skills, and leisure and recreational skills through targeted activities. These activities may include [the seven enumerated activities].

This modification would serve to clarify the meaning of the rule and would not result in a rule that is substantially different from the rule as originally proposed.

90. As originally proposed, item B(7) listed as one of the types of services that can be provided by a MHBA "assisting the parents to develop and use parenting skills that help the child achieve the goals outlined in the child's individual treatment plan or individual behavioral plan." In its post-hearing submission, the Department modified item B(7) by adding an additional sentence specifying that "[p]arenting skills must be directed exclusively to the treatment of the child." The Department indicated that this amendment is necessary to make explicit that the focus of the services provided under FCSS must be on the child and the child's treatment. The Department stated that this modification comports better with the state plan submitted to HCFA by Minnesota, merely makes explicit what was implicit in the provision as originally proposed, and will promote compliance. The modification clarifies the rule provision and does not result in a rule that is substantially different from the rule as originally proposed.

91. The Administrative Law Judge concludes that item B, as modified, has been shown to be needed and reasonable to establish a minimum set of service components and ensure that MHBA services will be provided in a uniform manner throughout the state.

Item C

92. As originally proposed, item C of subpart 5a stated that services must be provided in the child's residence, preschool, school, day care, and other community or recreational setting, and specified that "'[r]esidence' does not include a group home, regional treatment facility or other institutional setting, juvenile detention facility, an acute care hospital, or a foster care setting in which the license holder is not the primary care giver and does not reside with the child." The SONAR merely indicates that "it is reasonable for the mental health behavioral aide to provide mental health services to the child in diverse settings in which the activities take place" and did not further explain why the settings mentioned in item C were being excluded. MDLC questioned the

Department's rationale for specifying that the settings mentioned in item C were not a "residence." It urged that the proposed rule be rejected for failure of the Department to make an affirmative presentation of facts establishing the need for and reasonableness of the provision. MDLC pointed out that many children with a severe emotional disturbance will live at least for a time in a group home, and few, if any group homes provide intense mental health care at the level of the behavioral aide responsibilities. MDLC also questioned what was meant by "institutional setting" and why such settings were excluded under the proposed rule. If the intent of the rule was to prevent duplication of service or shifting of responsibility, MDLC indicated that it believes that item C is unnecessary since subpart 7, item P already lists as an excluded service "services that are the responsibility of a residential or program license holder including foster care providers under the terms of a service agreement or administrative rules governing licensure. . . ." MDLC argues that item C is overbroad in excluding these services from all group homes and institutional settings. It indicated that, at a minimum, the rule should be narrowed to exclude the provision of these services if a child's residence is an inpatient hospital unit, a state regional treatment center, or a residential treatment program licensed under Minnesota Rules parts 9545.0900 to 9545.1090.

93. The Department responded that the language in item C was included to prevent service duplication and to define service-setting parameters. The Department emphasized that, because family community support services are a set of services designed to help a child remain in a family-type setting in the community, it would be inconsistent with this purpose if the services were provided in an institutional setting. If a child is already in a placement outside his or her family or a family-like setting, it would, in the view of the Department, make no sense to provide services designed to help the child remain with his or her family in the community. As a result, the Department does not agree with the MDLC that the issue is solely one of services and not place of residence. The Department explained that the purpose of the definition was to exclude settings where mental health services would already be covered as part of a rate or fee paid to providers in that setting (such as providers of foster care in a setting in which the license holder is not the primary care giver and does not reside with the child) or where placement of an MA-eligible child would not be appropriate (such as in an institutional setting classified as an Institution for Mental Disease). The Department agreed that the language in the rule as originally proposed restricting what constituted a "residence" was broader than it needed to be. The Department also concluded that the use of the phrase "other institutional setting" in the rule may be insufficiently precise since MDLC construed it to include shelters, which the Department did not intend, and that it was unnecessary to include the reference to "juvenile detention facility."

94. In its final post-hearing submission, the Department modified item C to clarify what the term "residence" does not include, based upon its view that the language originally proposed led to confusion regarding what was meant by "institutional setting." As modified, the rule would specify that "'[r]esidence' does not include a residential treatment setting licensed under parts 9545.0900 to 9545.1090, a group home licensed under parts 9545.1400 to 9545.1500, a regional treatment facility, an acute care hospital, or a foster care setting in which the license holder is not the primary care giver and does not reside with the child." The Department contends that

this is merely an editorial change to clarify the intention of the provision in response to comments from MDLC, and is not a substantial change.

95. Minn. Stat. § 245.4871, subd. 17, provides that family community support services "means services . . . designed to help each child with severe emotional disturbance to function and remain with the child's family in the community." The same statutory provision specifies that family community support services "do not include acute care hospital inpatient treatment, residential treatment services, or regional treatment center services." It is logical for the Department to construe this provision to mean that family community support services should be provided in non-institutional, family-type settings. The Department has shown that the proposed rule, as modified, is needed and reasonable to ensure that the types of family community support services authorized by the rule are consistent with the legislative intent evident in the statutory provision. The modification serves to clarify the rule and was made in response to comments received during the rulemaking proceeding. The modification does not result in a substantial change.

Subpart 5b – Mental Health Crisis Intervention and Crisis Stabilization Service

96. New subpart 5b of the proposed rules provides for a procedure under which an initial assessment of a mental health crisis must be made using the resources of the crisis assistance or emergency services as defined in Minn. Stat. § 245.4871 before an on-site intervention by the mobile crisis response team is initiated. Under item A of the proposed rules, the following components must be performed as part of mental health crisis intervention and crisis stabilization services: immediate intervention must be provided based on the determination that the child's behavior is a "serious deviation from the child's baseline level of functioning"; a culturally-appropriate assessment must be conducted that evaluates the child's current life situation, mental health problems, and current functioning and symptoms; a written short-term crisis intervention plan must be developed within 72 hours of the initial intervention describing the mental health services needed by the child to reduce or eliminate the crisis, with the involvement of the child and his or her family; if the child shows positive change toward restoration to a baseline level of functioning or a decrease in personal distress, the team must document that treatment goals have been met and that no further services are required; if the child is stabilized and requires less than eight hours of mental health crisis intervention services or a referral to less intensive mental health services such as family community support services, the team must document referral sources, treatment goals, need for the services, and the types of services to be provided; and a written long-term intervention plan must be developed if more than eight hours of crisis intervention services are needed, with the involvement of the child and the child's family. If the child and family refuse to approve the plan, the refusal and reasons must be noted by the team. Under item B of the proposed rules, mental health crisis intervention and crisis stabilization services are limited to no more than 192 hours per calendar year without authorization. Item B also specifies that MA will not pay for mental health crisis intervention and crisis stabilization services if they are used as crisis respite care.

97. The SONAR indicated that the duties specified in the plan are based upon the community service plan developed by Caplan in 1964 as necessary components of effective treatment for a child in crisis. It further stated that the rule advisory committee felt that a maximum of 192 hours, equivalent to eight consecutive 24-hour days, is sufficient to either resolve the crisis or determine that a different level of care is required. If the child is not successfully returned to baseline level within the specified time frame, the Department indicated in the SONAR that the child may then benefit from a more intensive level of therapy or a more restrictive therapeutic environment.

98. No interested party objected to subpart 5b. Minn. Stat. § 256B.0625, subd. 35(2), requires that MA cover as FCSS mental health crisis intervention and crisis stabilization services provide outside of hospital inpatient settings and that the Department promulgate rules determining the extent to which such services shall be covered by MA. The Department has shown that subpart 5b is needed and reasonable to describe the relationship between existing mechanisms available for handling crisis situations and the new service that is being added by authority of Minn. Stat. § 256B.0625, subd. 35(2) and to define the duties that must be performed by the mobile crisis response team to ensure consistency and accountability.

99. As proposed, subpart 5b refers in subitems (3)-(5) to "the team," but does not clearly state that it is the mobile crisis response team that has the obligation to perform the initial assessment of the crisis as set forth in subpart 5b. Although the proposed rule is not defective as written, the Administrative Law Judge suggests that the Department consider revising the first sentence in item A to clearly indicate who has the obligation to perform the initial assessment of the crisis. If this suggestion is accepted by the Department, item A would be revised to include the following or similar language: "Prior to initiating on-site intervention by the mobile crisis response team, the mobile crisis response team must make an initial assessment of the crisis using the resources of the crisis assistance or emergency services as defined in Minnesota Statutes, section 245.4871. The following components must be performed by the mobile crisis response team as part of mental health crisis intervention and crisis stabilization services . . . ." This modification, if made by the Department, would serve to clarify responsibilities under the rule and the Department's intent, and would not result in a rule that is substantially different than the rule as originally proposed.

Subpart 5c – Therapeutic Components of Preschool Program

100. New subpart 5c of the proposed rules implements the requirement of Minn. Stat. § 256B.0625, subd. 35(3), that MA cover, to the extent authorized by DHS, "the therapeutic components of preschool . . . programs." The proposed rule specifies that MA payment for therapeutic components of a preschool program is limited to 72 hours of treatment in a calendar year unless authorization is obtained for additional hours. The rules further state that the therapeutic components of a preschool program must be available at least one day per week for at least a two-hour time block, which may include individual or group psychotherapy and recreation therapy, socialization therapy, or independent living skills therapy, to the extent included in the child's individual treatment plan or behavioral plan. The proposed rules require daily and weekly documentation of treatment, and require that the treatment be provided by a

multidisciplinary team under the supervision of a mental health professional. The proposed rules provide that the multidisciplinary team "consists of any combination of the following individuals: a mental health professional and a mental health practitioner under the clinical supervision of a mental health professional on the team, or a program staff person as defined in part 9503.0005, subpart 21, provided that the person meets the qualifications and training of a Level I MHBA and is under the direction of a mental health professional." The direction of the program staff person by the mental health professional must meet the requirements set forth in subpart 5a, item F. The multidisciplinary team may recommend and coordinate community service resources and multiple service delivery systems such as county social services, school, the children's mental health collaborative, child protection, and corrections.

101. In its SONAR, the Department indicated that this service was modeled after day treatment. The Department stated that the therapeutic components of a preschool program are "designed to be a step down from the day treatment model" which is a structured program of treatment and care that includes group psychotherapy and other intensive services provided by a multi-disciplinary staff under the clinical supervision of a mental health professional. The Department indicated in its SONAR that it is reasonable to limit this program to 72 hours per calendar year without authorization because this length of time was recommended by the advisory committee as clearly appropriate. The Department explained that, when looking at the length of each treatment, the advisory committee looked at the minimum daily standard for day treatment, which is a minimum of one 3-hour time block. Taking into consideration the attention span of the children in this population, the advisory committee felt it was reasonable to require that the treatment be available at least one day a week for one 2-hour time block. Finally, the SONAR pointed out that the use of a multidisciplinary team under the clinical supervision of a mental health professional was advisable to ensure that the differing levels of services are properly provided.

102. No interested party objected to the proposed rule. The Department has shown that the proposed rule is needed to provide details on the workings of the preschool programs mandated by Minn. Stat. § 256B.0625, subd. 35. Although the proposed rule is not defective as written, the Administrative Law Judge suggests that the Department consider a slight revision to the language in subitem B describing the composition of the multidisciplinary team in order to clarify the Department's intent and parallel the language of the similar requirement contained in subpart 5d relating to therapeutic components of a therapeutic camp program. As revised, the second sentence of subitem B would state, "A multidisciplinary team consists of any combination of the following individuals: a mental health professional, a mental health practitioner under the clinical supervision of a mental health professional, or a program staff person as defined in part 9503.005, subpart 21, provided the person meets the qualifications and training of a Level I mental health behavioral aide and is under the direction of a mental health professional." This modification would not cause the final version of the rule to be substantially different from the rule as originally proposed.

Subpart 5d – Therapeutic Components of a Therapeutic Camp Program

103. Subpart 5d of the proposed rules permits MA payment for therapeutic components of a camp program limited to 20 hours of treatment in any calendar year.

The proposed rules indicate that the 20-hour time block may include individual or group psychotherapy as well as recreation therapy, socialization therapy, and independent living skills therapy to the extent they are included in the child's individual treatment plan or individual behavioral plan. The rules go on to provide for daily and weekly documentation of treatment and for the provision of treatment by a multidisciplinary team under the clinical supervision of a mental health professional, similar to the rules relating to therapeutic components of a preschool program. In its SONAR, the Department indicated that the program relating to therapeutic components of a camp program was, again, modeled after day treatment and designed to be a step down from day treatment and skills training generally provided by mental health practitioners. The Department indicated that it is necessary to limit this program because camp is time limited. The Department indicated that the service was designed to a be a time-limited service for approximately one week, calculated for five 4-hour days, so the limit of 20 hours per calendar year without authorization is reasonable. The Department further indicated that the advisory committee looked at the minimum daily standard for day treatment (a minimum of one three-hour time block) and decided that a slightly longer time block (4 hours as opposed to 3 hours under day treatment) was reasonable for this program because camp is generally targeted toward school aged children and adolescents and the focus is on skills training.

104. No one many any objection to this subpart of the proposed rules. The Administrative Law Judge concludes that the Department has shown that subpart 5d is needed and reasonable to provide necessary information to the regulated public concerning how the therapeutic camp programs required by Minn. Stat. § 256B.0625, subd. 35, will operate.

Subpart 6 – Components of Family Community Support Services

105. Subpart 6 of the current rule specifies that a provider of family community support services is responsible to provide necessary diagnostic assessments and the family community support components specified in a child's individual treatment plan. The current rule identifies as components of family community support services only crisis assistance and individual, family, or group skills training, including assistance in developing independent living skills, assistance in developing parenting skills necessary to address the needs of the child, and assistance with leisure and recreation activities. The proposed rules add new items C through F to the list of components of FCSS. These items specify that the following services also are components of family community support services: services provided by a MHBA as identified in the individual treatment plan and the individual behavior plan under subpart 5a; mental health crisis intervention and crisis stabilization services provided under subpart 5b; therapeutic components of a preschool program under subpart 5c; and therapeutic components of a camp program under subpart 5d. In its SONAR, the Department pointed out that these provisions are consistent with the statutory requirements set forth in Minn. Stat. § 256B.0625, subd. 35. No one objected to this portion of the proposed rules. The proposed rules have been shown to be needed and reasonable to identify the components of family community support services, in compliance with Minn. Stat. § 256B.0625, subd. 35.

Subpart 7 – Excluded Services

106. Subpart 7 of the current rules sets forth services that are not eligible for MA payment, with certain exceptions. Under the rules as originally proposed, the Department added new items O, P, and Q to subpart 7. Item O, as originally proposed, stated that the "services of a mental health behavioral aide under subpart 5a, item B, provided by a personal care assistant" are not eligible for MA payment. In its SONAR, the Department indicated that, "[b]ecause personal care assistants currently provide services that may be provided by mental health behavioral aides, in order to prevent duplication of service, it is necessary and reasonable to clarify that services provided by a mental health behavioral aide cannot be provided by a personal care assistant for the same child."[54] In discussing whether there were less costly or less intrusive methods for achieving the purpose of the proposed rule, the Department in its SONAR stated that the services in the proposed rule "are mostly intended to supplant the use of personal care assistants (PCAs) and the more costly institution-based mental health services such as those offered by inpatient hospitalization and children's residential treatment."[55] Item P of the proposed rules provides that "services that are the responsibility of a residential or program license holder including foster care providers under the terms of a service agreement or administrative rules governing licensure" are not eligible for MA payment, and item Q specifies that "crisis hotlines" are not eligible for MA payment. In its SONAR, the Department stated that item P was added to emphasize the appropriate payer of services, and contended that it is reasonable to prohibit MA payment for mental health services that duplicate health services funded by another program because the prohibition is fiscally responsible and consistent with statutory and regulatory requirements. Finally, the SONAR stated that item Q was necessary to clarify that MA will not pay for crisis hotlines as part of the mental health crisis intervention and crisis stabilization service. The Department contends that it is reasonable to take this approach because crisis hotlines provide "non face-to-face referral and educational services by non-mental health staff who do not have the knowledge and skills to discern clinically appropriate mental health services."[56]

107. Item O is the only specific language in the rule as originally proposed addressing the interplay between the use of PCAs and Mental Health Behavioral Aides (MHBAs). At the hearing and in post-hearing comments, several questions were raised by MDLC, FEAT, and others concerning whether children who were severely emotionally disturbed and receiving PCA services would still be able to receive them, and whether children receiving waivered services would be able to receive the new MHBA services. FEAT suggested eliminating item O of subpart 7 and indicated that, if item O were interpreted to exclude PCAs, that would be a severe problem for families of children with autistic spectrum disorders. The Department panel did not answer the majority of these questions during the hearing, stating that it preferred to provide written responses.

108. In the Department's January 17, 2001, preliminary written comments (which were provided before the end of the twenty-day comment period at the urging of the Administrative Law Judge), the Department reiterated that behavioral aides are intended to supplant or replace the use of personal care assistants only in a very specific context and not across the board. The Department indicated that the "introduction of MHBAs is not meant to create a larger pool of available hours by combining PCA hours and MHBA hours. Children and families will need to choose

whether they will access PCA services or MHBA services. The rule provisions preclude a child from receiving PCA services and MHBA services at the same time." The Department also indicated that concurrent usage of PCA services and MHBA services would not be allowed in any circumstance, and MHBAs "will be performing services formerly provided by PCAs without mental health training, if the reason for the use of PCA services was based on a mental health need." In addition, the Department stated that, although children could access waivered services for those with mental retardation and related conditions (MR/RC) at the same time they are receiving services from a MHBA, children could not access PCA services based on mental health needs at the same time they are receiving services from a MHBA. The Department indicated that an MR/RC case manager would need to make sure that there is a need for mental health services and that the child qualifies for family community support services.[57]

109. In its January 25, 2001, comments, MDLC objected that the SONAR had not been sufficiently specific with respect to the relationship between MHBA services and PCA services to enable interested persons to prepare any testimony or evidence in favor of or in opposition to the proposed rules and also contended that the Department had not properly described the classes of persons who would be affected by the proposed rule.

110. In its January 25, 2001, submission, the Department proposed to modify the introductory language to subpart 7 to clarify that the services specified in items A to Q "are not eligible for medical assistant payment as family community support services." The Department indicating that it was proposing the modification in order to correct the implication of the original language that the services specified were not eligible for medical assistance payments under any circumstance, and clarify the Department's intent that the specified services are merely not eligible for medical assistance payment as family community support services. FEAT concurs with this proposed amendment.

111. On January 30, 2001, the Department notified MDLC, Ms. Cole, Ms. Kerr, and the Administrative Law Judge by facsimile transmission that the Department would propose in its final five-day response modifications to the rule amendments under consideration to clarify the interplay between MHBA and PCA services. The Department did not provide the exact text of the modification, but indicated that it would state that children who are eligible to receive FCSS can choose to receive MHBA services only if they are not receiving PCA services during the same period, and that MHBA services would not be eligible for MA payment as a family community support service if provided to a recipient while that recipient is authorized to receive PCA services, either as a home care service under Minnesota Statutes, section 256B.0627, or as a home and community-based waivered service under Minnesota Statutes, section 256B.0915, 256B.092, 256B.093, or 256B.49.[58] The Department stated that the modification would clarify that accessing MHBA services under FCSS is a choice contingent on being eligible for FCSS services. The Department indicated that it believed that the option will most often be chosen for children who are now receiving PCA services under MA home care to address an emotional or behavioral disorder rather than a physical disability. The Department further stated that, if the MHBA option is chosen, the MHBA hours would not be an add-on to PCA services but would in fact

replace or supplant them during the time the responsible person chose to follow the MHBA option. According to the Department, the number of hours of MHBA services would not necessarily be the same as the number of hours of PCA services the child had been authorized to receive. The Department indicated that the child could receive up to the hours specified in the rule without even seeking authorization but would need authorization to continue services beyond those thresholds. Children receiving PCA services under the applicable waivers could also choose to receive MHBA services instead if they met the criteria. The Department indicated that it believed that that was less likely because most PCA services provided under the waivers address physical disabilities rather than behavioral disorders. If a choice were made to receive MHBA services, the Department stated that choice would rule out the option of receiving PCA services under a waivered program.

112. In its February 1, 2001, submission, MDLC asserted that the Department's view that PCA services and MHBA services would be mutually exclusive would mean that a child with severe physical and emotional disabilities would have to choose to treat one disability over the other and contended that this was an unacceptable outcome for children with dual diagnoses. MDLC complained of its inability to respond to the actual language that the Department would propose (since the actual language of the DHS modification was not filed until just prior to the 4:30 p.m. deadline on the last day of the five-day reply period). The MDLC opposed adoption of this rule provision for several reasons. First, it contends that the notice requirements of the Minnesota Administrative Procedure Act were not properly followed since the rule as originally proposed did not address the effect of the MHBA service on a child's eligibility for PCA services. The MDLC pointed out that the original version of rule part 9505.0326, subp. 7(O) and the accompanying SONAR merely indicated in that "services of a mental health behavioral aide under subpart 5a, item B, provided by a personal care assistant" would not be eligible for MA payment in order to prevent duplication of services. In the view of the MDLC, the Department's January 30 response goes far beyond that concept to make the two services mutually exclusive even when they serve different purposes, such as PCA assistance with wheelchair transfers and catheterization. MDLC contends that the rule proposed by DHS on the deadline for the five-day response is not a modification but an entirely new rule, and asserts that classes of persons affected such as dual-diagnosis emotionally disturbed and developmentally disabled children never received notice that their services would be affected this way.[59] Second, MDLC argues that the statement in the SONAR that MHBA services "are mostly intended to supplant the use of personal care assistants" is not sufficient to put the public on notice since the SONAR is not published in the State Register. Moreover, the MDLC asserts that the SONAR did not explain when, how, and to what extent the new service would supplant PCA services or contain an appropriate analysis of the persons affected by the proposed rules, less intrusive or alternative methods that could be used, or the differences between the rule and federal regulations. Third, MDLC argues that the DHS does not have statutory authority to preclude mutual access to PCA services and MHBA services. MDLC points out that the Legislature did not amend either the Family Community Support Services statute or the Personal Care Assistance statute to state that a recipient could not get both services at the same time. Although MDLC acknowledges that the DHS has authority to impose

utilization controls and prevent overlap and duplication of services, it contends that the proposed rule reflects an attempt by DHS to go beyond that by imposing limitations on the amount and scope of services available to these disabled persons. Fourth, the MDLC asserts that the proposed modification results in a rule that is substantially different from the rule as originally proposed and thus should be the subject of a new notice and hearing. Finally, MDLC argues that the proposed modification discriminates against children with dual diagnoses and violates federal laws ensuring the child's access to both services. In particular, MDLC cites 42 C.F.R. §§ 440.240(b), which requires that services made available to any individual in a covered medically needy group must be "equal in amount, duration, and scope for all recipients within the group," 42 C.F.R. § 440.230(b), which requires that "[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose," and 42 U.S.C. §1396d(r)(5), which requires that the state must furnish "necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions," including federally authorized Medicaid service.

113. FEAT also objected to the Department's decision to propose the modification at the end of the process without affording FEAT an opportunity to review and comment on the proposed language. FEAT asserted that there is no support in the rulemaking record for the Department's view that children eligible for FCSS can choose to receive MHBA services only if they are not receiving PCA services during the same period. FEAT contended that the Department's approach ignores the fact that many families receive PCA services for purposes such as respite, household assistance and physical care, and asserted that the Department had not advanced any rationale or evidence for supplanting these services. FEAT argued that the Department's change is outside the scope of the rulemaking proceeding and is totally unsupported by evidence in the record.

114. In its final five-day response, which was filed on February 1, 2001, at 4:27 p.m., the Department provided further response to those objecting to the rule and also set forth the text of the modifications it proposed to item 7, including the language relating to the interplay between MHBA, PCA, and waivered services. With respect to FEAT's arguments, the Department responded in its February 1, 2001, submission that "[t]he Department believes that offering the option of using PCAs or MHBAs does not necessarily eliminate PCA time. If parents are currently receiving PCA services and wish to continue doing so rather than seeking MHBA services, nothing in the proposed amendments would prevent that."[60] The Department proposed in its February 1 response to modify subpart 7, items G, H, N, and O. Under the original version of the proposed rules, items G and H were not to be amended. As finally proposed for adoption, subpart 7, items G, H, N, and O would provide as follows:

> Subp. 7. **Excluded services.** The services specified in items A to Q are not eligible for medical assistance payment <u>as family community support services</u>:
>
> * * *

G. family community support services simultaneously provided with home-based mental health services, except when part 9505.0324, subpart 6, item I, subitems (3) and (4) apply;

H. family community support services simultaneously provided with therapeutic support of foster care services, except when part 9505.0327, subpart 8, item I, subitems (3) and (4) apply;

* * *

N. family community support services provided in violation of subparts 1 to 6 and subpart 8;

O. services of a mental health behavioral aide provided to a recipient while that recipient is authorized to receive personal care assistant services under Minnesota Statutes, section 256B.0627 or under one of the waivers described in Minnesota Statutes, section 256B.0915, 256B.092, or 256B.093;

* * *

115. According to the Department, it is necessary to amend items G and H to take into account the transitional services added by the proposed amendments to part 9505.0324, subp. 6(I)(3) and (4) (relating to home-based mental health services) and to part 9505.0327, subp. 8(I)(3) and (4) (relating to therapeutic support of foster care). The Department asserts that these modifications are an editorial change to correct an oversight in the proposed amendments and are not a substantial change. Although items G and H were not originally among the provisions to be amended in this rulemaking proceeding, the amendments proposed by the Department are necessary to avoid inconsistency with the transitional services added by the proposed amendments to part 9505.0324(6)(I)(3) and (4) and part 9505.0327(8)(I)(3) and (4). The Department has shown that it is needed and reasonable to make the proposed modifications to items G and H. The modifications are consistent with amendments proposed to other parts of the proposed rules and do not render the rule as finally proposed for adoption significantly different than the rule as originally proposed.[61]

116. The Department asserted that it is necessary to modify item N to correctly identify subpart 8 and correct an editorial oversight. It is necessary and reasonable for the Department to find that family community support services that are provided without compliance with the orientation and training requirements set forth in subpart 8 are not eligible for MA payment. The modification clarifies the proposed rules and does not result in a substantial change.

117. After careful consideration, the Administrative Law Judge concludes that the Department's proposed modification of item O has not been shown to be needed or reasonable or consistent with the Department's statutory authority. In addition, if the modification were permitted, it would result in language that was substantially different from the rule as originally proposed. The Department's original proposal to add a new item O was based upon its view that services of a MHBA that were, in fact, provided by a PCA were not eligible for medical assistance payment as family community support services. The Department recognized in its SONAR that PCAs currently provide

services that may be provided by MHBA and stated that item O was necessary and reasonable to prevent duplication of service. The modification now sought by the Department goes far beyond the initial purpose of item O and would, in essence, make it impossible for a family to use both MHBAs and PCAs even when the PCA is serving a non-mental-health-related need, such as the provision of physical care, respite care, or household assistance. The modification has not been shown to be needed and reasonable since it would force families with children with a dual diagnosis of a physical and mental disability to choose to treat either the physical disability or the mental disability. The rulemaking authority granted to the Department by the Legislature merely authorized the Department to promulgate rules "as necessary to implement the changes outlined in" Minn. Stat. § 256B.0625, subd. 35, which added certain services to the list of family community support services. While the Department properly may prevent overlap and duplication of service, there is no authority in state law for the Department to take the approach urged in the modification. Moreover, as pointed out by MDLC, federal Medicaid law and rules support the view that it would be improper to put children with dual diagnoses in such a predicament. Finally, if the rule were modified as proposed by the Department, it would make the rule substantially different from the rule as originally proposed, within the meaning of Minn. Stat. § 14.05, subd. 2. The Notice of Hearing did not provide fair warning that the outcome of the proceeding might be a rule that would preclude the use of PCAs for non-mental-health-related purposes if MHBAs were used; the modification was not a logical outgrowth of the comments submitted during the hearing but vastly exceeded the scope of those comments; several classes of persons had no notice that their interests would be affected based upon the original published version of the rule, such as children with dual diagnoses; and the modified rule has a much broader impact than the rule as originally proposed.

118. To correct this defect, the Department should revert to item O as originally proposed. The need for and reasonableness of item O as originally proposed was supported by the SONAR and the Department's post-hearing submissions. Thus, item O would exclude from MA payment as FCSS "services of a mental health behavioral aide under subpart 5a, item B, provided by a personal care assistant."

Subpart 8 – Required Orientation and Training

119. Subpart 8 of the current rules requires that providers who employ a mental health practitioner to provide FCSS require the mental practitioner to complete 20 hours of continuing education every two calendar years relating to serving the needs of a child with severe emotional disturbance in the child's home environment and the child's family. The Department proposes to amend this subpart by adding new items B and C relating to preservice training and continuing education for MHBAs. Under the rules as proposed, a provider who employs a mental health behavioral aide to provide FCSS must require the person to complete 30 hours of preservice training, including 15 hours of face-to-face training in mental health services delivery and eight hours of parent teaming training. The proposed rule sets forth components of parent teaming training. In addition, the proposed rules require that a mental health behavioral aide must receive 40 hours of continuing education every two calendar years relating to

serving the needs of children with severe emotional disturbance and the child's family in the child's home environment.

120. In its SONAR, the Department indicated that the proposed rules are necessary and reasonable to establish standards consistent with Minn. Stat. § 245.4871, subds. 26 and 27, which require that mental health practitioners and mental health professionals receive training to work with children, and part 9535.4068 of the current rules, which specifies that each person who is employed for pay or under contract to provide FCSS must receive orientation and pre-service training regarding procedures for responding to a child's crisis, as well as additional training in the different diagnostic classifications of emotional disturbance, specific characteristics of the classifications, and the use of psychotropic medications. The SONAR further noted that, because MHBAs will likely not have the skills and experience necessary to work with children who have severe emotional disturbances, it is necessary and reasonable to require that they receive a substantial amount of training before they can work with these children. The SONAR indicates that training on a one-to-one, face- to-face basis will prepare MHBAs to better perform their responsibilities and that parent teaming training must be included in light of the admonition im Minn. Stat. § 245.4876 that the child and the child's family be involved in all phases of developing and implementing the individual treatment plan to the extent possible. The advisory committee recommended a total of 30 hours of pre-service training as the minimum amount of time necessary to prepare a MHBA, with half of that time including face-to-face training on mental health service delivery. The Department indicated that this level of training would enable the provider to determine the competency of the MHBA in the delivery of face-to-face services. The Department has shown that the requirement of 30 hours preservice training for MHBAs and the components of that training as set forth in item B are necessary and reasonable to ensure that MHBAs will be properly trained regarding how to work with children and parents.

121. With respect to item C of the proposed rules, the SONAR stated that it is "necessary and reasonable to require that mental health behavioral aides to receive 40 hours of continuing training every two years because that requirement is contained in part 9535.4068, subpart 2, governing continuing training for providers of family community support services."[62] However, the existing requirement in part 9535.4068, subpart 2, merely requires that "a person who is employed for pay or under contract to provide family community support services receives *at least 20 hours of continuing training in a two-year period"* (emphasis added). The Department has not proposed to change part 9535.4068 as part of this rule package. The Department relied on current rule 9535.4068 as authority for item C, apparently based upon an inaccurate impression that that rule required 40 hours of continuing training every two years, and did not provide any other affirmative presentation of fact supporting a higher requirement for MHBAs than for mental health practitioners or other providers of FCSS. Accordingly, the Administrative Law Judge finds that the Department has not shown that the requirement contained in item C that a MHBA must receive 40 hours of continuing education every two calendar years is needed or reasonable. In order to correct this defect, the Department should modify the provision to simply require 20 hours of continuing education every two calendar years. That modification will render the rule

consistent with existing rule 9535.4068 and will not result in a rule that is substantially different than the rule as originally proposed.

Subpart 9 – Travel to the Child's Treatment Site

122. Subpart 9 of the proposed rules adds MHBAs to the list of mental health workers in the current rule who are permitted to receive payment for travel to and from the site where family community support services are provided, up to a threshold level set in the current rule. No one objected to this rule provision. This provision is needed and reasonable to extend to MHBAs the same travel reimbursement policy that is currently available to mental health practitioners and mental health professionals.

9505.0327 – Therapeutic Support of Foster Care

123. Subpart 8, item I of the current rule generally provides that MA funds may not be used to pay for therapeutic support of foster care services if the same services are provided to the family under parts 9505.0323, 9505.0324, or 9505.0326, with certain specified exceptions. The proposed rules amend item I to add two exceptions to the list. New subitem 3 would permit MA payment without prior authorization for up to 45 hours of services provided by a Level I MHBA within a six-month period and 90 hours of services provided by a Level II MHBA within a six-month period delivered concurrently with therapeutic support of foster care services to a child with severe emotional disturbance if the child is being transitioned into or out of therapeutic support of foster care services and those services and the services provided by a MHBA are identified in the child's individual treatment plan. New subitem 4 would permit MA payment without prior authorization for up to 96 hours of mental health crisis intervention and stabilization services per calendar year provided by a mobile crisis response team under part 9505.0326 provided concurrently with therapeutic support of foster care services to a child with severe emotional disturbance if the child is being transitioned into or out of therapeutic support of foster care services and provision of these services is documented in the child's record. In the SONAR, the Department indicated that the addition of subitem 3 is necessary to specify that the general prohibition in item I regarding the use of MA funds to pay for therapeutic support of foster care services that duplicate services already available from other funding sources does not apply when therapeutic support of foster care services and family community support services provided by a MHBA are assessed concurrently for a time-limited period. The Department indicated that it is reasonable to allow MA payment in this situation because the services are more complementary than duplicative. The Department indicated that it is necessary to establish limits for the concurrent provision of therapeutic support of foster care services and family community support services because the criteria for each service package is different. The Department stated that FCSS are designed to provide services for a time-limited period to improve or maintain the child's emotional or behavioral functioning and reduce the risk of out-of-home placement. Because this is a transitional service, the Department indicated that it is reasonable to limit the hours of service provided by a Level I MHBA to 45 hours within a six-month period and the hours of service provided by a Level II MHBA to 90 hours within a six-month period because these limits are one half of the limits allowed for the same period under other family community support services, which provides sufficient support for the child. If the child requires more service than allowed by these limits, the Department indicated that the

child likely needs a higher level of care than the skills training components accessible through family community support services.

124. The Department's SONAR supplied a similar rationale for proposed new subitem 4. The Department stated that this language was added to allow children who are transitioning from FCSS to therapeutic support of foster care services or vice versa to receive mental health crisis intervention and crisis stabilization service provided by a mobile crisis response team during the transition to or out of therapeutic support of foster care services. The Department asserted that concurrent provision of this mental health service with the therapeutic support of foster care service package offers an opportunity for the child to make a successful transition from one service package to another during a time when a crisis may occur. The SONAR further indicated that the payment for the crisis intervention and stabilization service during transition is identical to that of family community support services. The Department contends that it is reasonable to allow 96 hours per calendar year, which is half of the limit allowed under family community support services, because that amount of time should be sufficient to resolve the crisis or determine that a different level of care is required. If the return to baseline level cannot be successfully achieved with the specified time frame, the Department indicated that the child may then benefit from a more intensive level of therapy or a more restrictive therapeutic environment.

125. The limits set in 9505.0327, subpart 8(I)(3) and (4) are fixed as half of the limits set in proposed rule 9505.0326, subpart 5a, relating to family community support services. As discussed earlier in this rule report, several interested parties objected to the latter threshold limits. Those objections and the Administrative Law Judge's conclusion that the Department did not establish the need for and reasonableness of the thresholds established in proposed rule parts 9505.0326, subpart 5a, 9505.0324, subpart 6(I)(3) and (4), and 9505.0327, subpart 8(I)(3) and (4), are discussed in connection with proposed rule 9505.0326, subpart 5a. See Findings 67 through 84. As noted in Finding 84, because the thresholds established under 9505.0327, subpart 8(I)(3) and (4), were simply fixed as approximately half the levels set in 9505.0326, subp. 5a, with no convincing further explanation of the reason for their selection, the Administrative Law Judge concluded that those levels are also defective for failure to establish need and reasonableness. Suggestions for correcting this defect are noted in Finding 84.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Human Services gave proper notice of this rulemaking hearing.

2. The Department of Human Services has substantially fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Department of Human Services has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii), except as noted in Finding 117.

4. The Department of Human Services has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii), except as noted in Findings 46, 83, 117, 121, and 125.

5. The additions and amendments to the proposed rules suggested by the Department of Human Services after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minnesota Stat. §§ 14.05, subd. 2, and 14.15, subd. 3, except as noted in Finding 117.

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3, 4, and 5 as noted at Findings 84, 118, and 121.

7. Due to Conclusions 3, 4 and 5, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department of Human Services from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts as appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted, except where otherwise noted.

Dated: March 13, 2001.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape recorded; no transcript prepared.

---

[1] Minn. Stat. §§ 14.131 through 14.20.

[2] Minn. Stat. § 14.15, subd. 1.
[3] Minn. Stat. § 14.15, subds. 3-4.
[4] Minn. R. 1400.2240, subp. 5.
[5] Minn. Stat. § 14.131 and Minn. R. 1400.2220, subp. 1(E).
[6] Ex. A.
[7] Ex. G.
[8] 20 U.S.C. § 1412(a)(20).
[9] 30 C.F.R. § 300.148(a)(2). Sections 300.280 through 300.284 require that, prior to adoption, "state educational agencies" make policies and procedures available to the general public; provide sufficiently detailed notice to inform the general public about the purpose and scope of the policies and procedures, their relationship to the IDEA, and the date and location for the hearing; hold public hearings that afford a reasonable opportunity to participate; provide an opportunity for comment by the general public for a time period of at least 30 days following the date of the notice; and review and consider comments and make any necessary modifications in the policies and procedure. With the possible exception of 34 C.F.R. § 300.282 (which indicates that notice must be published and announced in newspapers, other media, or both), these requirements are similar to and consistent with the requirements of the Minnesota Administrative Procedure Act that are being followed in the present rulemaking proceeding.
[10] Minn. Stat. § 256B.04, subd. 1.
[11] Minn. Stat. §§ 256B.02, subd. 8, and 256B.0625, subd. 35.
[12] Minn. Stat. §§ 256B.4871, subd. 17, 245.462, subd. 20(c), and 245.4712, subd. 1; Minn. R. 9505.0326, subp. 1(C).
[13] Minn. Stat. §§ 245.4871, subds. 6 and 15, and 245.462, subd. 20(c).
[14] Minn. R. 9505.0326, subp. 1(H).
[15] Minn. R. 9505.0326, subd. 1(H) and Minn. Stat. § 245.4871, subd. 17.
[16] Minn. R. 9505.0326, subd. 1(H).
[17] Laws of Minnesota 1999, Chapter 245, Art. 4, Sec. 49.
[18] *Id*.
[19] Laws of Minnesota 1999, Ch. 245, Art. 4, Section 111.

[20] See Laws of Minnesota 1999, Ch. 245, Art. 4, Section 111.
[21] Minn. Stat. 256B.04, subd. 2.
[22] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[23] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
[24] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[25] *Mammenga*, 442 N.W.2d at 789-90*; Broen Memorial Home v. Minnesota Department of Human Services,* 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[26] *Manufactured Housing Institute*, 347 N.W.2d at 244.
[27] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
[28] Minn. R. 1400.2100.

[29] *See* SONAR at 3-5.

[30] SONAR at 4.
[31] Exhibits F and H; DHS Letter of Feb. 1, 2001.
[32] Minn. Stat. § 14.15, subd. 3.
[33] Minn. Stat. § 14.05, subd. 2.

[34] SONAR at 9.
[35] *See* Hearing Ex. I.
[36] January 25, 2001, submission at 5.
[37] Ex. 10.
[38] Ex. 8.
[39] January 25, 2001, submission.
[40] Feb. 1, 2001, submission, Attachment B. Although "additional evidence" is not to be submitted during the five-day reply period 9see Minn. Stat. § 14.15, subd. 1), the information submitted by the MDLC is not in the nature of new evidence that should be precluded from consideration because It was in direct rebuttal to the assertions made by the Department in its 20-day submission suggesting that the clinicians on the advisory committee supported the thresholds reflected in the proposed rule. Moreover, the information related to advisory committee minutes that the Department undoubtedly also has in its possession.
[41] *See, e.g.,* Minn. R. 9505.5010 (prior authorization requirement in general); 9505.0220 (health service for which required prior authorization was not obtained is not eligible for payment under MA); 9505.0190 (prior authorization necessary if required health service is not available within Minnesota); 9505.0245 (chiropractic services); 9505.0270 (dental services); 9505.0287 (certain hearing aids); 9505.0310 (medical supplies and equipment); 9505.0323 (mental health services); 9505.0324 (home-based mental health services); 9505.0325 (certain nutritional products); 9505.0326 (family community support services); 9505.0327 (therapeutic support of foster care); 9505.0340 (pharmacy services); 9505.0353 (prenatal care services); 9505.0360 (private duty nursing services); 9505.0365 (prosthetic and orthotic devices).
[42] Minn. R. 9505.5010-5105.
[43] *Federal Security Administrator v. Quaker Oats Co.,* 318 U.S. 218, 233 (1943).
[44] Minn. R. 9505.0326, subp. 7(C).
[45] Minn. R. 9505.0324, subd. 6(B).
[46] Minn. R. 9505.0323, subp. 15.
[47] Minn. R. 9505.0324, subd. 6(B) and (D).
[48] *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 440 (Minn. App. 1985).
[49] *Manufactured Housing institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[50] *Id*. at 246.
[51] Department's January 25, 2001, response at 7.
[52] *Manufactured Housing Institute v. Pettersen,* 347 N.W.2d 239, 244 (Minn. 1984).
[53] Minn. Stat. § 14.05, subd. 3, provides the agency with authority to withdraw a proposed rule any time prior to filing it with the Secretary of State.
[54] SONAR at 24.

[55] SONAR at 4.
[56] *Id*.
[57] Department's Jan. 17, 2001, response at 4.
[58] The modification that was eventually proposed by the Department does not include a reference to Minn. Stat. § 256B.49.
[59] For example, the MDLC contended that organizations such as the Association for Retarded Citizens should have been notified of the impact that this rule will have on MHBA and PCA service availability for children with both an emotional disturbance and a developmental disability. It should be noted that ARC of Minnesota and ARC of Olmsted County did receive notice of the proposed rules, according to Exhibit G.
[60] DHS Feb. 1, 2001, submission at 6.
[61] As noted earlier, part 9505.0324(6)(I)(3) and (4) and part 9505.0327(8)(I)(3) and (4) have been found to be defective due to the failure of the Department to make a showing of need and reasonableness with respect to the threshold service levels selected. If the Department chooses to correct these defects by withdrawing those rule provisions in their entirety, it will, of course, be unnecessary to make the changes in items G and H of this rule part.
[62] SONAR at 25.